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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
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CHAPMAN AND DEWEY LAND COMPANY,
Plaintiff in Error,

vs.

CHARLES H. BIGELOW, N. P. BIGELOW, L. T. WALKER AND F. H. HARTSHORN,
Defendants in Error.

No. 262.

In Error to the Supreme Court of the State of Arkansas.

Abstract and Statement, Specifications of Error, Brief and Argument for Plaintiff in Error.

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Counsel for Plaintiff in Error.

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Defendants in Error.

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ABSTRACT AND STATEMENT.

This is a suit in equity to remove a cloud from the plaintiff in error's title to certain lands described in the complaint (and hereinafter described) and for that purpose to have declared void, invalid and of no effect, the several conveyances hereinafter referred to, under which the defendants in error claim title. The suit was brought by plaintiff in error in the Chancery Court of Poinsett County, Arkansas, January 29th, 1903, and after decree on September 6th, 1903, dismissing complaint, plaintiff in error took the suit by appeal to the Supreme Court of Arkansas, where decree below was affirmed on January

6th, 1906, whereupon plaintiff in error sued out a writ of error from this court. (Transcript, p. 1.) The lands in controversy and constituting the *locus in quo* are:

(1) All of the lands, as they are now formed and at present exist, which are embraced within that space marked and shown as water in the United States Government Survey and plat (hereinafter referred to) of fractional Township 12 North, Range 6 East, in Poinsett County, Arkansas, and which lie east of the main channel of the St. Francis river, as said river is marked and designated on the plat of what is known as the Anthony Survey, being a private and unofficial survey made in the year 1900 by one James Anthony, the plat of which is recorded in the office of the Recorder of Deeds of said Poinsett County, and is hereinafter more specifically referred to. Said lands have never been surveyed by authority of the United States Government, and on said plat of said so-called Anthony Survey, said lands are marked "Bigelow Bros.," except a small tract marked "School Land," and marked on said Anthony plat as a part of Section 16, which is not claimed by defendants in error and is therefore to be excepted from the lands in controversy.

(2) Also all of the land as it is now formed and at present exists, lying west of the United States Government meander line of fractional Sections 18 and 19, in Township 12 North, Range 7 East, embraced within that space marked and shown as water in the United States Government Survey and plat of Township 12 North, Range 7 East, in Poinsett County, Arkansas, and appearing on said Anthony plat hereinbefore referred to, marked "Bigelow Bros.," and designated on said Anthony plat as containing 503.03 acres adjoining the Government meander line of Section 18 and 230.12 acres adjoining the Government meander line of Section 19.

See transcript, page 138, for Anthony plat; for certified copies of United States Government plats, see transcript, pp. 33 and 34.

The lands now formed and at present existing immediately adjoining on the west of the United States

Government meander line of fractional Sections 6 and 7, Township 12 North, Range 7 East, and marked "Chapman & Dewey" on said Anthony plat, and shown on said plat as parts of Sections 6 and 7, Township 12 North, Range 7, not being claimed by the defendants in error, are not in controversy in this case.

All of said lands are wild, unimproved and unoccupied.

COMPLAINT.

The complaint (transcript, pages 22 to 31) sets up a title in the plaintiff in error under the Act of Congress of September 28, 1850, generally known as the "Swamp Land Grant," and the several conveyances and matters of record in the complaint mentioned, as follows, to-wit:

Selections by the State of Arkansas, approval thereof by the Secretary of the Interior of the United States and two patents from the United States to the State of Arkansas, all under said Act of Congress of September 28, 1850, conveying all surveyed sections and parts of fractional sections in fractional Township 12, North of the base line, in Range 6, East of the 5th principal meridian, containing 7,236.78 acres, and all surveyed sections and parts of fractional sections in Township 12 North, in Range 7 East, containing 13,815.67 acres: Said patents being dated respectively July 29th, 1856, and September 27th, 1858; both said patents being in the usual form and being specifically stated to be "according to the official plats and survey of said lands returned to the General Land Office," and containing *habendum* clauses in the usual form, as follows: "together with all the rights, privileges, immunities and appurtenances thereto belonging."

For said selections and approvals see pages 48 and 49 of transcript; for said patents see pages 35 and 36.

Surveys made prior to the above mentioned trans-

fers under direction and by authority of the United States Government and the field notes of said surveys and plats showing the lines of the sections, subdivisions and area thereof, the configuration of the land and water and revealing fully all the details of said survey, duly returned to the Surveyor General at the General Land Office in Washington by the surveyors who made said surveys. The complaint sets out that the said United States survey showed no land whatever in the greater part of Township 12 North, Range 6 East, and describes in detail the manner in which fractional sections and parts of sections in said Township 12 North, Ranges 6 and 7 East, patented as aforesaid by the United States to the State of Arkansas and by the State of Arkansas to Moses S. Beach, from whose heirs plaintiff in error acquired the same, are meandered upon the water by said survey. The body of water on which said sections and parts of sections are meandered is on said Government plats and in said field notes designated as "Sunk Lands," "St. Francis River Sunk Lands," "Hatchie Coon Sunk Lands" and "Cut-Off Lake."

For certified copies of said original plats on file in the General Land Office, see transcript, pp. 33 and 34. For said field notes of Sections 2, 35 and 36, Township 12, Range 6, see transcript, pages 37 to 40; Sections 4 and 3, Township 12, Range 6, pages 44 to 46; Sections 7, 18 and 19, Township 12, Range 7, pages 40 to 43; Section 6, Township 12, Range 7, page 46; Section 30, Township 12, Range 7, page 43.

Patents from the State of Arkansas to Moses S. Beach, dated June 12, 1871, conveying to him all of the land in fractional Township 12 North, Range 6 East, lying east of what is now the main channel of the St. Francis river and meandered and abutting on what was water at the date of the United States surveys hereinbefore referred to, as appears by reference to the certified

copies of the official plats of said surveys hereinbefore referred to and filed with the transcript.

Conveying also all of Sections 18, 19 and 30, Township 12 North, Range 7 East, the same being meandered on and made fractional by said body of water. Also conveying Section 36, Township 13 North, Range 6 East. The above mentioned conveyances from the State of Arkansas to Moses S. Beach are embraced in three patents (transcript, pages 50 to 53). All of said patents are in the usual form, refer to the Swamp Land Grant of September 28, 1850, and contain *habendum* clauses in the usual form, "with the appurtenances and hereditaments."

Deeds conveying all said lands from the widow and all the heirs of Moses S. Beach (who after receiving said patents had died intestate) to William B. Beach and from William B. Beach and wife to Chapman & Dewey Land Company, the plaintiff in error herein.

For these deeds see transcript, pages 53 to 60.

(It is admitted in the answer of defendants in error that plaintiff in error has title to Section 36, Township 13 North, Range 6 East, by the same chain of conveyance last above mentioned. Transcript, page 78.)

As to Sections 6 and 7, Township 12 North, Range 7 East, as shown on said United States Government plats, the plaintiff in error in its complaint alleged and afterward by undisputed record evidence showed that it had acquired these sections under tax sales made under and by virtue of an Act of the Legislature of the State of Arkansas, generally known as the "Overdue tax law," and by deeds from the proper officials under said tax sales to the grantors of the plaintiff in error; also by other tax sales for delinquent taxes at which plaintiff in error was the purchaser and by deeds thereunder to the plaintiff in error and by decrees of the Chancery Court of said Poinsett County confirming the title to said

Sections 6 and 7 in the plaintiff in error, also in its grantors. All of the deeds and decrees under which plaintiff in error acquired the title to this particular land will be found in the transcript, pages 62 to 76.

The complaint and exhibits and admissions in the answer show an undisputed title in the plaintiff in error to all the fractional sections of land lying east of the present main channel of St. Francis river, and, as shown on said United States Government plats, meandered and abutting on the body of water hereinbefore referred to.

In the year 1900, as set out in the complaint, one James Anthony, a surveyor then in the employ of the Board of Directors of the St. Francis Levee District, under grant from which Board of Directors the defendants in error claim the lands in controversy, undertook to survey the region shown as water on the United States plats and surveys hereinbefore referred to and upon which the fractional sections of land patented by the United States to the State of Arkansas under said Swamp Land Grant of September 28, 1850, and by the State of Arkansas to the grantors of the plaintiff in error abut and are meandered. Such unofficial survey definitely locates the main channel of the St. Francis river. See plat, page 138 of transcript, introduced in evidence by defendants in error.

On the 11th day of October, 1900, and on the 11th day of January, 1901, said Board of Directors of said St. Francis Levee District attempted to convey to C. H. Bodkin all the region shown as water on the United States Government plats and surveys of Township 12 North, Range 6 East, hereinbefore mentioned, lying east of the main channel of the St. Francis river, as definitely located on said plat of the unofficial survey of said James Anthony hereinbefore referred to, except said small tract marked "School Lands" on said Anthony plat; and all the region shown as water on the United States Govern-

ment plats and surveys of Township 12 North, Range 7 East, lying west of the meander lines of fractional Sections 18 and 19, in said last named Township and Range (see page 138, transcript); and by virtue of *mesne* conveyances the defendants in error claim title to the lands in controversy.

This constitutes the cloud sought to be removed in this case from the fee simple title of the plaintiff in error to the lands in controversy, as riparian owners of all the lands shown meandered and abutting on said body of water (the *locus in quo* in this case) on said United States Government plats and surveys, and for which plaintiff in error's grantors were grantees under patents from the United States and the State of Arkansas.

ANSWER AND CROSS-COMPLAINT.

The defendants in error in their answer (transcript, pages 76 to 83), admit the title of the plaintiff in error to all the surveyed fractional sections and parts of sections in Township 12 North, Range 6 East, lying east of the present main channel of the St. Francis river, as hereinafter located, as said fractional sections and parts of sections are shown on the said United States Government surveys, and admit that the title of plaintiff in error thereto was acquired by it under and by virtue of the selections by the State of Arkansas, approvals thereof by the Secretary of the Interior, patents from the United States to the State of Arkansas, patents from the State of Arkansas to Moses S. Beach, and the conveyances thereafter made, all as set out in the complaint. Defendants in error admit a similar title in plaintiff in error to fractional Sections 18, 19 and 30, Township 12 North, Range 7 East, and Section 36, Township 13 North, Range 6 East, by the same chain of conveyances above mentioned. Defendants in error, however, deny the plain-

tiff in error's title to fractional Sections 6 and 7, Township 12 North, Range 7 East.

The defendants in error in their said answer, while admitting the selections by the State of Arkansas, approvals thereof by the Secretary of the Interior and patents to the State of Arkansas, allege that said Townships 12 North, in Ranges 6 and 7, were "granted by the United States to the State of Arkansas as a whole, whereby all land within the borders of said townships became the property of the State of Arkansas, regardless of whether it had been surveyed or not."

Defendants in error admit in said answer that prior to said transfer by the United States to the State of Arkansas, the surveys referred to in the complaint were made under the direction and authority of the United States Government and were, with the field notes thereof, returned to the Surveyor General at the General Land Office in Washington; but they deny that said surveys and the plats thereof showed no land in the greater part of said Township 12 North, Range 6 East, and allege that the record of the survey shows land where the plaintiff in error alleges no land is shown. They allege that at the time the surveys were made, the record thereof shows that the water was high, but that it could be surveyed in dry seasons, and contend that the words "Sunk Lands" on that part of the plats of said survey embracing the region in question, indicated that the "place is not a body of water, but a body of land, sunk."

It is admitted in said answer that the region in question is indicated on the Government plats in the same way that a body of water is usually indicated, but it is alleged that the record of said survey shows it to have been land at that time, and not water. The answer further alleges that in making said survey the surveyors were easily mistaken as to the location of St. Francis

river, and that it is manifest that in some cases they would call for St. Francis river when all they could have meant was that they had reached water, which was the overflow from St. Francis river, or some small bayou or cut off of said stream, "the fact being that the so-called 'sunk lands' are a body of lands lying on both sides of the St. Francis river, sunk, and in the rainy season easily overflowed, and at the time of the survey the meandered lines were run around this body of sunk and overflowed lands as if it had been a body of water, but at the same time the field notes showed that it was not a body of water, but land covered with water, and also bearing trees and vegetation, willow and cypress."

The answer further alleges that the meandered lines, as run in said surveys, "through" the surveyed fractional sections and parts of sections acquired by the plaintiff in error, as set out in its complaint, were run as *boundaries*, and were not run for the purpose of finding the number of acres in the several subdivisions for which the purchasers should pay.

The answer further admits that there is now outside of and beyond the original lines of said surveys above set out and east of the main channel of the St. Francis river, a considerable body of land adjacent to each of the tracts before mentioned (meaning the fractional sections and parts of sections acquired by the plaintiff in error as before stated), but denies that such land forms any part of said tracts, and denies that any of said land accrued to plaintiff in error. (Tr. 79).

The answer admits that "in the year 1900 James Anthony, a surveyor in the employ of the Board of Directors of the St. Francis Levee District, undertook to survey the lands which lay outside of and beyond the lines run by the Government Surveyor, and defendants in error say it is true that James Anthony did survey

said lands, being the lands not subdivided into sections and parts thereof by the Government Surveyors, because of the water then covering them, and such survey made by James Anthony and field notes and plats, defendants admit, are filed in the office of the Recorder of Poinsett County, and these defendants admit *that such survey and plats show the main channel of the St. Francis river, definitely.*"

The answer admits the execution of the alleged deeds under which the defendants in error claim title to the lands in controversy as alleged in the complaint, and which plaintiff in error claims constitute a cloud on its title and denies that the plaintiff in error has any title to the said lands by virtue of the patents and conveyance and the Government Survey, plats and field notes (being the lands surveyed as aforesaid by James Anthony), and denies that the alleged deeds under which defendants in error claim title thereto are clouds on any title of the plaintiff in error.

The answer admits that they have posted notices on said lands warning all persons to desist from trespassing thereon.

The defendants in error then proceed to set up as matter of cross-complaint the alleged title of defendants in error to the lands in controversy, which alleged title they state to be as follows:

That "they were granted to the State of Arkansas by an Act of Congress of the United States, approved on the 28th day of September, 1850, an Act known as the Swamp and Overflow Act;" that under said act the Secretary of the Interior included in a list of swamp and overflowed lands transmitted to the Governor of Arkansas, the whole of Township 12 North, Range 6 East, and Township 12 North, Range 7 East, and that a patent for said township was granted to the State of Arkansas; whereby, it is alleged in said cross-complaint, the

legal title to all lands in said townships, whether then subdivided into sections or not, passed to the State of Arkansas and remained in said State until the year 1893, in which year, it is alleged in said cross-complaint, said title became vested in the Board of Directors of the St. Francis Levee District by reason of an Act of the Legislature of the State of Arkansas granting to the said Board of Directors of the St. Francis Levee District all lands within said District the title to which was in the State of Arkansas; "that this act of donation by the Legislature of the State of Arkansas went into effect on the 29th day of March, 1893, and thereby the legal title to the *unsurveyed* lands in Township 12 North, Range 6 East, and Township 12 North, Range 7 East, became vested in the Board of Directors of the St. Francis Levee District."

The cross-complaint then alleges that the Board of Directors of the St. Francis Levee District on October 11th, 1900, conveyed said lands to C. H. Bodkin and that under and by virtue of the chain of conveyances previously hereinbefore referred to the title which the defendants in error now claim to said lands passed to them.

The prayer of the cross-complaint is that Chapman & Dewey Land Company be enjoined from further impleading the cross-complainants in any cause wherein Chapman & Dewey Land Company, or any one holding under them, shall allege title to the lands involved.

REPLY.

The reply of plaintiff in error to the answer and cross-complaint (transcript, pages 83 to 85) is a general denial of new matter alleged in the answer, and further specifically denies that the defendants in error are the owners of the unsurveyed lands attempted to be conveyed to C. H. Bodkin by the St. Francis Levee District; denies that said unsurveyed lands were granted to the

State of Arkansas by the United States by virtue of the Swamp Land Grant of September 28th, 1850, as alleged in the cross-complaint; denies that said unsurveyed lands were ever included in the list of swamp and overflowed lands transmitted to the Governor of the State of Arkansas by the Secretary of the Interior; denies that the United States ever issued a patent to the said State of Arkansas for said unsurveyed portions of said Township 12 North, Range 6 East, and Township 12 North, Range 7 East; denies that by the grant from the United States to the State of Arkansas of the surveyed lands in said townships the legal title to the unsurveyed portions of said townships passed to the State of Arkansas as swamp lands under said Act of Congress, and denies that the title to such unsurveyed portions remained in the State of Arkansas until the year 1893.

It is further alleged in said reply that whatever rights the State of Arkansas acquired to said unsurveyed parts of said township under and by virtue of the patents from the United States Government of the surveyed portions of said townships, passed to the said State as riparian owner of the surveyed lands properly meandered on the permanent bodies of water, covering at the date of said Act of Congress of September 28, 1850, and at the date of the surveys and plats made pursuant to said Act, the unsurveyed portions of said townships now owned by plaintiff as in its complaint alleged, and that all the right, title and interest of said State in and to said unsurveyed portions of said townships as such riparian owner passed from said State to the grantees of the State in the patents conveying said surveyed lands from the State, and under and by virtue of those patents and the riparian rights thereto appertaining and the *mesne* conveyances thereunder, passed to and now belong to the plaintiff in error.

The said reply admits the creation of the Board of

Directors of the St. Francis Levee District by Act of the Legislature of the State of Arkansas in 1893, but denies that by virtue of the provisions of any act of said Legislature any title to the unsurveyed portions of said townships in controversy in this case passed to said Board of Directors, such title having long before 1893 passed from the State of Arkansas to the plaintiff in error's grantors, and by *mesne* conveyance to the plaintiff in error as riparian owner, by virtue of patents referred to in the complaint.

The reply further denies that the conveyance from said Board of Directors of St. Francis Levee District to C. H. Bodkin and subsequent *mesne* conveyances to defendants in error conveyed any title to the lands in controversy, but alleges that such conveyances simply constitute a cloud on plaintiff in error's title.

EVIDENCE OF PLAINTIFF IN ERROR.

The Bill of Exceptions (Transcript, page 142, *et seq.*) shows the introduction by the plaintiff in error without objection of the selections and approvals, patents, conveyances, Government plats, field notes, decrees, and all the matters of record as alleged in its complaint, under and through which it derives its title to the lands described in said complaint.

The Bill of Exceptions also shows the introduction of the depositions of Peters, Davis and Varner, taken in another case for the purpose of showing the present condition of the *locus in quo* in controversy and not for the purpose of showing or even as tending to show by inference, the condition of the *locus in quo* at the date of the United States surveys and plats, or at the date of the Swamp Land Grant, namely September 28, 1850; and therefore plaintiff in error specially excepted from offer and moved to strike out volunteer statements of witness Peters beginning "I want to say further" to

"Did you find [illegible]" (Transcript, p. 93), being volunteer statement of a mere opinion, not responsive to any question, and incompetent, immaterial and irrelevant to any issue in this case, and because it tended to contradict by volunteer oral expression of opinion the United States plats and surveys and the ruling of the Secretary of the Interior thereon (Transcript, p. 85).

At this point it is stated by counsel for both parties that it was originally agreed that either party might read these depositions, but neither party claims the right under such agreement to urge incompetent testimony on the court. (Transcript, p. 144.)

The plaintiff in error does not rely on these depositions and omits any attempt to abstract them here, their purpose being merely to show the present condition of the region in question not affecting what the plaintiff in error conceives to be the main issue in this case. The complaint relied on title both by "accretion and reliction" and "by riparian rights" flowing from the United States patents into which the plats are to be read, state patents of like character with *mesne* conveyances to plaintiff in error. The unsurveyed region claimed by plaintiff in error up to channel of St. Francis River being unnavigable, the accretion and reliction allegations in complaint become unimportant and the evidence to show present conditions and gradual filling up also become unimportant. Plaintiff in error claims by riparian right the bottom to the channel of the St. Francis River, wet or dry, hence there is no occasion to abstract depositions of Peters, Davis and Varner as to present conditions and gradual filling up.

For Peters's deposition, see transcript, pages 86 to 96; for Davis's deposition, pages 96 to 108; for Varner deposition, pages 108 to 110.

For agreement admitting certain uncontested facts see page 110, transcript.

The Bill of Exceptions further shows that the plaintiff in error offered in evidence the finding and opinion of the Secretary of the Interior of the United States, dated November 17, 1902, the authenticity of which was admitted, and which was filed and made a part of the record in this cause, and is in this abstract fully set out, as follows: (See transcript, pages 111 to 115).

The plaintiff then offered in evidence the opinion of the Secretary of the Interior of the United States, the authenticity of which is admitted, as follows: (See transcript, pages 111 to 115.

RULING OF SECRETARY OF INTERIOR.

E. F. B.

2469-1902. November 17, 1902.

The Commissioner of the General Land Office.

SIR:—The Department is in receipt of your letter of June 2, 1902, relative to an alleged trespass upon what you term the unsurveyed lands in the northeastern part of Arkansas, known as the "sunk lands of the New Madrid earthquake."

The alleged trespassers are persons who claim to have purchased said lands from the Board of Directors of the "St. Francis Levee District," created and organized by the act of the Legislature of Arkansas of February 15th, 1893, which fixed the boundaries of said district and empowered and made it the duty of said Board to levy annually a tax on all lands in said levee district, be assessed according to the increased value or betterment estimated to accrue from protection against floods from the Mississippi river by reason of the construction of levees. At the same session the Legislature of the State passed an act (March 29, 1893) donating to said district, for the purpose of building and maintaining levees, all the lands of the State lying within said districts, except the sixteenth section, and all right, title or interest that the State had or might acquire to any lands within said district, except the sixteenth section, during the five years immediately after said act, by reason of forfeiture for taxes.

A special agent of your office states in his report that in an interview with the officers of said Board he learned that it claimed title to the lands in question under said act of March 29, 1893, and also bases its claim upon letters from your office and from the Secretary of the Interior, declaring in effect, that if the unsurveyed lands, known as the "Sunk Lands," were, at the date of the township surveys covered by bodies of water and were afterwards uncovered by the recession of the waters, such lands would belong to the owners of the adjacent lands as riparian proprietors, and the United States would have no authority to survey and dispose of them, assuming that the lands contiguous to and surrounding the meandered waters have been disposd of. The special agent expresses the opinion that there is no doubt that at the time of the township surveys these lands were simply covered by the overflow of the Mississippi river, and that they must be classed as agricultural lands, and not as covered by permanent bodies of water and therefore subject to State or riparian ownership; that "some of these lands are five miles wide and are covered with the finest timber, which is exceedingly valuable, and when cleared will make fine cotton and corn plantations and become some of the most valuable ones in the State." You recommend that steps be taken to enjoin the St. Francis Levee Board from disposing of any of said lands and that the purchasers of the lands from said Board be enjoined from cutting any timber thereon.

The lands in question are in Township 11 to 16 North, inclusive, in Range 6 East, and in Township 12 to 17 North, inclusive, in Range 7 East, which were surveyed at different times from 1841 to 1849. The field notes and the plats of those surveys show that what are now reported to be unsurveyed lands were at the date of the township surveys covered by permanent bodies of water that were meandered as lakes and rivers, having a depth, as shown by the field notes, varying from 5 to 15 feet. A large portion of the surveyed lands lying along the meander lines are designated in the field notes as overflowed and unfit for cultivation.

The letter of your office and the letter of the Sec-

retary of the Interior referred to by the special agent as a basis of the claim of the Levee Board, were written in response to a communication from the chief engineer of the St. Francis Levee District, of June 25, 1894, to the Secretary of the Interior, in which, referring to the fact that the unsurveyed part of said townships consisted of lakes and swamps, he says:

The numerous overflows since then have filled up these lakes and swamps very much, and changed largely the general features of the country. To such an extent has this filling up been done, that the areas and depths of these lakes and swamps have been very much reduced and around their margins forests of large timber now stand on space then occupied by water. This filling up increases the possibility of drainage, and recent cross-sections of that basin show that the whole can be drained into the St. Francis and Little rivers.

He stated that he was informed that the title to these unsurveyed lands yet remains in the Government, and as the drainage of the lakes in the St. Francis basin is necssary to the maintenance of the levees, he suggested that the lands be donated to the State or the Levee Board for the purposes stated.

Said letter having been referred to your office, it was stated in response thereto, by letter of August 25, 1894, that "when, in the extension of the lines of public surveys, a lake is meandered, its area is segregated from the public domain and beds of inland non-navigable meandered lakes or lands uncovered by the recession of the waters of such lakes from natural or artificial causes, since the survey and disposition of the adjacent shore lands, do not belong to the United States, but to the riparian owners." The Department, by letter of November 20, 1894, concurred in the views of your office and stated that from the facts then appearing the Government had no jurisdiction over said lands and no power to direct their survey.

It appears from a communication by the chief engineer of the St. Francis Levee District, dated September 3, 1901, set forth in your letter, that this matter was brought to the attention of the Department in 1894,

with a view to having the lands surveyed and disposed of by the Government if it still holds the title. The purpose of the board was to have the title of the Government divested, if it had any, so that the lands might pass into private ownership in order that they may be subject to the tax for their proportion of the cost in constructing levees. He says:

If the General Government has no jurisdiction of these unsurveyed lands and does not claim any, and if a survey of them cannot therefore be made by the Government, then it is the purpose of our Board to have them surveyed and sell them or quit-claim them and place them on our levee tax books, so that they may be taxed for levee purposes and therefore pay their proportion towards the construction of the levees and drains by which they have been and are being so greatly improved and benefited. If the General Government will survey them so that we can tax them when parties buy them from the Government or homestead them, then our purposes will be equally accomplished.

It is not questioned that the portions of said townships which are represented on the plats of survey as bodies of water are now valuable lands. On the contrary, the chief engineer states that he knows of his own personal knowledge that farms of great value are now cultivated in the very bottom or lowest places of some of these unsurveyed lands, but he adds: "All of this conversion of these low lands is of course due to our levees keeping the overflow out of the low lands, and our drainage systems which afford them drainage."

It may be mentioned in this connection that by the agreement between the United States and the State of Arkansas, entered into February 23, 1895, and ratified by the Act of April 29, 1898 (30 Stat., 367), the State of Arkansas relinquished to the United States all claim to the swamp lands in said State, except such as had been patented, approved or confirmed to the State at the date of said agreement, but said Act of April 29, 1898, confirmed the title of all persons who had purchased from the State any unconfirmed swamp land and had received a deed for the same. As these lands had not been patented, approved or confirmed to the State, and

had not been sold by the State to any person, except perhaps one tract, which it is alleged had been sold prior to said agreement, the "St. Francis Levee District" can not sustain its claim to said lands under the swamp land grant, and unless the title of the Government has been otherwise divested, or its right to said lands was concluded by the approval of the township surveys and the disposal of the adjacent lands the action of the St. Francis Levee District in disposing of said lands is without warrant or authority and steps should be taken to enjoin it from disposing of the same and its purchasers should be enjoined from cutting the timber thereon.

Therefore the conditions existing at the date of the township surveys is the important fact to be ascertained in order to determine whether steps should be taken to prevent depredations on these lands. The returns of the township surveys show upon their face that what are now alleged to be unsurveyed portions of said townships were then actually bodies of water and were properly meandered as such. There is nothing in the report of the special agent, or in any of the papers submitted therewith, to impeach those returns as to the physical conditions of land and water at that time.

The opinion expressed by the Secretary of the Interior in his letter of November 30, 1894, herein referred to, was based upon the decision of the Supreme Court in the case of *Hardin* v. *Jordan* (140 U. S., 371), assuming that there was no mistake in the surveys and that the lands contiguous to the meander line had been disposed of. In the case of *Hardin* v. *Jordan* the doctrine was clearly announced that the right and title of a grantee from the United States of public lands bordering on non-navigable lakes and ponds, extends to the center of the lake or pond if the Government has not reserved any right or interest that might pass by the grant or done any act showing an intention to make such reservation. The rights of riparian proprietors are controlled by the respective laws of the States, but that does not affect the question as to whether the General Government is, by disposing of the public lands bordering

on non-navigable lakes and ponds, properly meandered, concluded from afterwards exercising jurisdiction over said lands and from disposing of the same. Upon this question the court said:

It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters.

While the United States does not, by the approval of the survey, and the disposal of lands contiguous to the meander line, part with its title to lands that were erroneously omitted from survey, yet, as stated in the decision of the court in *Hardin* v. *Jordan, supra*, there should be some extraordinary proof of mistake on the part of the surveyor in order to interfere with the passing of the land as riparian lands. It appears upon the face of the township plats of survey, and from the field notes thereof, that the lands in question were at the dates of the survey covered by bodies of water, which were properly meandered as such, and it does not appear from the report of the special agent that he has any evidence at hand to support his opinion that said lands at the time of survey were simply covered by overflow from the Mississippi river, nor is there anything shown by your letter or by the papers submitted therewith that tends to impeach the returns of the township surveys.

More than fifty years have passed since the dates of the respective surveys of the township in which these lands are situated, and it does not appear that the correctness of those surveys was ever questioned within the time when the physical conditions of the townships at the date of the survey could easily have been ascertained. These facts were evidently taken into consideration by your office and by the Department in 1894, when the request of the St. Francis Levee District to have said lands surveyed was refused.

The action of the Board of Directors of the St. Francis Levee district in exercising control over said lands appears to have been prompted by the disclaimer

of jurisdiction and authority over them by the Government, as expressed in the letters of your office and of the Department, above referred to, and such disclaimer was based upon the information furnished by the records of your office, which show that the authority and jurisdiction of the Government over said lands was terminated by the approval of the surveys and the sale of the lands along the meander lines. It does not appear from anything in the records whether the body of water that once covered the lands in question was navigable or not, but the result would be the same in either case. If it was a non-navigable body of water the riparian right vested by the sale of the lands along the meander lines by the Government. If it was a navigable body of water the title of the bed thereof passed out of the United States upon the admission of the State to the Union, and was thereafter subject to the laws of the State. The surveyed lands in said townships adjacent to the meandered waters having been disposed of, as appears from your letter of July 10, 1902, and it not being shown that said waters were not properly meandered, and the jurisdiction and control of the Government over the lands in question having thus terminated, the action of the Department of November 30, 1894, is adhered to, and no further or other action will be taken with reference to said lands.

The papers are herewith returned.

Very respectfully,

E. A. HITCHCOCK,
Secretary.

The Bill of Exceptions further shows the proceedings relating to this offer in words as follows: (Transcript, pp. 145 to 147.).

"Mr. Norton, on behalf of defendants, objects to the introduction in evidence of the proceedings before the Secretary of the Interior as set forth in the above document; and objects to the introduction in evidence of the finding of the Secretary of the Interior."

"Mr. Ashley for the plaintiff states that the above decision of the Secretary of the Interior is *res adjudicata* on the question of fact as to whether or not the *locus in*

quo was a body of water at the date of the Swamp Land Grant, and states that it is held by the courts of the States and of the United States that such decision is conclusive as to the character of the land. The Secretary of the Interior decided on the application of the grantors of the defendants, the St .Francis Levee District, as to this identical land, that it was at the date of the Swamp Land Grant, water, and that it went to the riparian grantee. That the State of Arkansas was riparian grantee, and that the grant of the State was identical with the grant of the United States to the State. Mr. Ashley, for the Plaintiff, asked this ruling of the Secretary of the Interior, holding that these unsurveyed portions of Township 12 N., Ranges 6 and 7 E., were permanent bodies of water at the date of the Swamp Land Grant, and that they belong to the riparian owners of sections properly meandered on such permanent body of water, be considered as a final decision of the question of fact that they were at the date of the grant covered by a permanent body of water, not as swamp lands but by riparian rights."

"The court overruled plaintiff's offer for that purpose, stating that he considered it a question for the court, and that to so accept the decision of the Secretary of the Interior would be to permit the Secretary to invade the province of the court. To which ruling of the court the plaintiff at the time excepted and its exceptions were noted of record."

"Mr. Ashley for plaintiff argues that the United States has the right to say through its Secretary that it does not grant land as swamp land, but by riparian rights. The court rules that the decision of the Secretary of the Interior is simply a ruling by the department that the United States makes no claim to the land. To which ruling of the court the plaintiff then and there excepted, and its exceptions were noted of record."

"Mr. Ashley for plaintiff argues that the decision of the Secretary of the Interior was a finding on the question of fact that the land in controversy was at the date of the grant covered by a permanent body of water, and that oral evidence is not admissible to show that it

was not a body of water in 1850; and contends that the ruling of the Secretary of the Interior as to whether it was land or water at that date is final. Plaintiff specifically requests that the decision of the Secretary of the Interior be admitted in evidence for the purpose of showing that, in regard to the identical lands in controversy, the Secretary of the Interior of the United States has passed on the question of whether or not it is swamp land, and has held that at the date of the grant to the State it was a permanent body of water and, therefore, such decision is on this question in the nature of *res adjudicata.*"

"The court overrules this offer, and rules that the decision of the Secretary of the Interior is not admissible in this case, and that the Secretary of the Interior could not make a decision that would be binding upon the State; that the Secretary of the Interior could not make a binding decision in a contest between the State and a riparian owner as to what was the condition at the time of the Swamp Land Grant, and that the Secretary could not bind the State by an *ex parte* opinion. To this rulinig of the court the plaintiff excepts at the time, and its exceptions are noted of record."

"Mr. Ashley for plaintiff urges that numerous decisions hold that the Secretary of the Interior may make a ruling on such a question of fact, and that oral testimony in such cases is admissible only where the Secretary has failed or refused to make a ruling. The court rules finally that it will not admit in evidence the decision of the Secretary of the Interior as *res adjudicata* on the question of whether or not in 1850 the property in controversy was a body of land, or water, stating that he does not think the Secretary of the Interior has the power to decide the question. To which ruling the plaintiff at the time excepted, and its exceptions are noted of record."

"Plaintiff then offered in evidence said decision of the Secretary of the Interior hereinbefore filed (about the genuineness and authenticity of which there is no question made by counsel; and which is admitted to be genuine and authentic) to show that said Secretary has decided that these fractional sections having been mean-

dered, according to the plats, upon blank, unsectionalized portions of the townships, as shown by the Government plats, such blank, unsectionalized portions are not surveyed but are unsurveyed, and, furthermore, because in such opinion the Secretary of the Interior holds that these unsectionalized portions have never been surveyed, and that they never having been patented, or surveyed or selected, they could not pass to the State of Arkansas, as swamp land."

"Plaintiff further offers said decision of the Secretary of the Interior in evidence for the purpose of showing that the land in controversy has never been surveyed under the direction of the United States Land Department."

"Plaintiff offers it for the further purpose of showing that in making surveys of public lands the United States Land Department does not treat as surveyed lands portions of townships which appear upon the plats of such surveys as unsectionalized, which are not subdivided into legal subdivisions, and which are meandered, on such township plats as bodies of water."

"Plaintiff offers said decision for the further reason that the selection, approval, confirmation, platting and patenting of United States Government Lands are the concurrent action of the Federal and State officers having the authority, and that the Secretary of the Interior has in such opinion passed upon the question of what were in fact at the date of the Swamp Land Grant in 1850, swamp and overflowed lands within these townships."

"Plaintiff offers said decision of the Secretary of the Interior for the further reason that in it said Secretary of the Interior says: "As these lands have not been patented, approved or confirmed to the State, and have not been sold by the State to any person." Such language being a finding that the said lands have not been patented, approved or confirmed to the State."

"The court overrules the offers of said plaintiff, and excludes said decision of the Secretary of the Interior from evidence. To which ruling the plaintiff then and there excepted, and its exceptions were noted of record."

Plaintiff in error thereupon rested.

TESTIMONY OFFERED BY DEFENDANTS IN ERROR.

Defendants' oral evidence consisted of the depositions of witnesses John M. Biggs, Charles S. Odom and James Anthony.

For deposition of Biggs see transcript, pages 117 to 126; deposition of Odom, pages 126 to 128; deposition of Anthony, pages 128 to 137; contract between Anthony and Board of Directors of St. Francis Levee District, page 138; plat of the survey of lands in controversy, made by James Anthony in the year 1900, follows page 138 in the transcript.

The plaintiff objected to the depositions of Biggs, Odom and Anthony "if offered for the purpose, and in so far as they attempt, by inference or otherwise, to impeach or contradict the official plats and field notes of surveys made under the general direction of the General Land Office of the United States, or to attack the finality or correctness of the ruling of the Secretary of the Interior to the effect that the unsurveyed lands in controversy were, at the date of the Swamp Land Grant, covered by a permanent body of water and that the surveyed fractional sections and parts of sections owned by plaintiff were, in such surveys and plats, properly meandered on such permanent body of water; oral evidence of witnesses being incompetent for such purpose in this case, because the Secretary of the Interior has not only not failed or refused, but has actually officially passed on such question of fact, especially as no one of the witnesses claims to have known anything about the *locus in quo* earrlier than 1874, and such oral testimony of conditions existing since 1874 is incompetent, immaterial and irrelevant for the purpose of attempting to show condition of *locus in quo* September 28, 1850."

(See transcript, page 116.)

"The court thereupon overruled the objection of plaintiff and permitted the introduction of said deposi-

tions of Odom, Anthony and Biggs; to the overruling of which objection and the introduction of such evidence the plaintiff at that time excepted and asked that its exceptions be noted of record, which was done."

(See Bill of Exceptions, pages 147 and 148, transcript.)

Mr. Norton, for defendants, then read in evidence, over the objections and exceptions of plaintiff, as above stated, the deposition of John M. Biggs, Charles S. Odom and James Anthony.

(See Bill of Exceptions at page 148 of transcript.)

The plaintiff specially objected to part of Anthony's deposition, on page 130 of transcript (being page 24 of the original deposition), and from thence to the end of the direct examination, and moves to strike it out, in so far as it is attempted to show by oral evidence, the condition of the *locus in quo* at the date of the Swamp Land Grant September 28, 1850, especially in view of the fact that the witness had already testified that he didn't know anything about it earlier than 1874. Which objection and motion was by the court overruled, to which ruling the plaintiff at the time excepted, and asked that his exceptions be noted of record.

(See Bill of Exceptions at page 148 of transcript.)

The plaintiff-in-error deems the said depositions of Biggs and Odom of no importance or relevancy to the issues in this case and therefore omits any attempt to abstract them.

ANTHONY'S DEPOSITION.

James Anthony in his said deposition testified, on direct examination, in substance as follows: My name is James Anthony; I live in Memphis, Tennessee; I am fifty-four years old and my occupation is that of a civil engineer. This has been my business since 1866; I studied my profession in Germany and in Sweden. I gradu-

ated in 1866 at Stuttgart. I have practiced this profession continuously since 1866.

I know the lands involved in this suit. I have some connection with the defendants in this case. With reference to these identical lands, I have no connection. I employed Mr. Odom to investigate the meander line and character of land it runs through. I did this for Bigelow Brothers. The plat used and referred to by Mr. Biggs and Mr. Odom in testifying is correct and was made in this office and filed for record. This is a copy of what is filed for record in Poinsett County. The subdivision is what is called "The unsurveyed land intersections," as shown on this plat. It was subdivided into sections by myself and under my direction in 1900, September and October, I think.

Timber grows all over the land; cypress and cottonwood on the outskirts of that land, both on the river and on the meander line. The center of the land in Section 10, 15, west half of 11, west half of 14, is the highest land in that country, comparing it with both sides of the river and it is known as "Gum Island," and the timber on these lands, this 10, 15, west half of 11 and west half of 14, are oak, some cottonwood, red gum, mulberry, some hickory, and is also covered with a dense undergrowth of spice wood. Between these lands which I have said are known as "Gum Island" and the land within the meander line, known as "Hatchie Coon," the country is low, swampy and in some places going as wide as a thousand and twelve hundred feet between high land and high land and narrowing down in places to seventy-five and one hundred feet wide.

I have followed the meandered line through 4 and 3 and 2 about which Mr. Biggs and Mr. Odom testified. I made those meander lines. As to the difference in the timber and land on one side of that line and the other, the timber on the "Hatchie Coon" property is oak and gum, and on the south, in between the two islands, cypress principally and some little cottonwood. I have known that country since 1874. It is known as the "Sunk Lands." It is possible at times to walk across that country. The best crossing is through 6, 12, 11

and 10 and through 9. There is an old wagon road that goes through there and there used to be a ferry. By 6 I mean Section 6 in 12-7.

Asked as to the nature of the country south of this crossing, with reference to the possibility of being crossed by team or horses or by foot, the witness said, "Well, what you call by foot, you mean across this country anywheres, as far as wagons are concerned, you would have to leave these middle sections out, and then you could cross through 35, 34 and 33 with wagon or otherwise."

It could not be crossed on foot in the south half of 24 and the south half of 22. By wading you can cross anywhere. There is water in Section 23. There may be a little flag in 14. The flag openings commence in the northeast corner of 2; they go down through Section 2 to the east half of Section 11. The east half of 14 and from the south line of Section 14 they turn due west, running out between Sections 14 and 23 and 15 and 22, and is here known as "Lead Fork Slough."

In Section 26 there is what is known as the "Scatters." That is more or less over the section; there is bunches of timber covering 25 or 30 acres, and these bunches of timber are surrounded by flag openings. There may also be a little of that in 25, but very little. 25 is pretty high ground, it is ash and oak. 25 is known as "Ash Camp."

Deposition of witness Anthony from this point, bottom page 130 of transcript to end of direct examination on page 131, was objected to by plaintiff in error and plaintiff in error moved to have same stricken out in so far as it attempted to show by oral evidence the condition of the *locus in quo* at the date of the Swamp Grant Act, September 28, 1850, especially in view of the fact that the witness has already testified that he didn't know anything about it earlier than 1874.

This objection and motion was by the court overruled and excepted to. Such testimony to which objection was made was substantially as follows:

The meander line through sections 6, 7, 18 and 19 until the meander line intersects the scatters follows the

old steamboat channel known as the Old River Channel. Long years ago the Old River Channel was open and navigable for boats, and during the fall of 1876 was used as a clearer and better channel than the main St. Francis.

The St. Francis River Channel from the upper end of Hatchie Coon Island or Deep Landing during the fall of that year, was so covered and filled up with sunken logs that it was impracticable to use the main channel of the St. Francis River during that distance.

In 1876 I was engaged there as surveyor, and was, at that time, County Surveyor of Mississippi County, and was engaged in selecting four hundred thousand acres of timber land for the Dundee Land and Timber Company in Edinburg, Scotland. Such steamboats as they had, ran up the "Old River" channel in 1876. They were flat bottom boats and propelled by steam. The "Old River" channel crosses the range line in the South-East quarter of Section 24, 12-6 and passes through 24 and 25 in a southerly direction and enters the scatters or right hand chute of Little River proper in Section 25, or rather it leaves 25 and enters 36 and 31. From where the meander line leaves the right hand chute of Old River, Section 36, a depression or slough follows the United States meander line through sections 36 and 35.

(Testimony on direct examination ends here.)

On cross-examination, the witness Anthony testified in substance as follows:

Cross-Examination by Mr. Ashley (James Anthony).

I was over this body of unsurveyed land in September and October, 1900; I had two corps of surveyors in there. Samuel Sage, at that time county surveyor of Craighead county, had charge of one party and Ernest Acres had charge of the other party. Acres is now in Mississippi county, Arkansas, and Sage is either at Lake City, or Jonesboro, I don't know which. The plat from which I have been testifying (Transcript, p. 138), the same one that has been testified to by the other two witnesses, is the result of that survey, and was made about that time, and is a copy of the one filed by me in Poin-

sett county. I was not at that time connected with the St. Francis Levee Board; was not known as the engineer of the St. Francis Levee Board. I have never had any connection with the St. Francis Levee Board in the capacity of a surveyor. Under the contract given me by the St. Francis Levee Board for the purchase of the unsurveyed lands, it was stipulated and agreed that I was to survey the unsurveyed lands at my own expense, in order to determine the amount of acres for which I had to pay. I had a contract with the St. Francis Levee Board for the purchase of the lands in controversy in this case. At the time of the transfer of these lands by the St. Francis Levee Board to Mr. Bodkin, Mr. Bodkin held a contract, which was afterwards assigned over to me. The option was made in Charley Bodkin's name and in my interest. The conveyance was to Bodkin; Bodkin actually held the land, but I was really the beneficial party. The legal title, so far as the St. Francis Levee Board could convey any, passed to Charley Bodkin, and the equitable title, so far as they could convey any, was in me. I have not actually been on any of these lands in controversy since that survey made in September, 1900. I could not say, without referring to my notes, how many acres of land there actually were in what a survey would make of the whole section, if extended up, that shows on my plat to be 4-12-6. I should think there would be six hundred and forty acres. The south end of Hatchie Coon island, which I call Gum island, is not called Hatchie Coon island by a great many people. I think they sometimes call them the Upper and Lower Hatchie Coon island; but the people living in there make a distinction between the Hatchie Coon island, and call one Hatchie Coon and the other Gum. Some call it Upper and Lower Hatchie Coon island on account of the cross cypress slough. I have been at that island in the early spring. I was over there on that island in February, 1898, and I was again over the island in the latter part of 1899. In low places where the flag is there is water. There are times when I have been in there when the water averages two and a half and three feet deep. The soil is usually covered by old cypress. When you get further south there is

flag in it; but right around where the meander line is it is a thick growth of old cypress,—four and five and six inches. I refer now to the slough that is south of the old southern meander line of Hatchie Coon island. I am somewhat interested in the result of the present lawsuit. I am not interested in the lands that are involved in this controversy at the present time. I had a contract with the St. Francis Levee Board for all the unsurveyed lands within the St. Francis district. I don't think there was any estimate ever made of the amount of these lands. I never at any time signed myself as "Chief Engineer" of the St. Francis Levee District. I remember the controversy that I had with a man named Schierholz, special agent of the United States Land Office. I was under a contract with the Levee Board to furnish information for the purpose of the recovery of timber on these unsurveyed lands. My contract was that if I held an option on these lands, I was practically the only man that knew where these lands were situated. In fact, I found them, and as long as it was to my interest,—as long as those lands were under contract to me,—to protect the timber on these lands. The St. Francis Levee Board, knowing this fact and knowing that I was thoroughly familiar with all the lands within the St. Francis Levee basin, entered into a contract with me, whereby I agreed to take care of and protect their interests in so far as depredations on their timber were concerned. And I was under contract to furnish necessary information to show anybody that cut timber on these lands to be depredators. I have that contract which I had with them, and am willing to let it go in as a part of my deposition. Such contract was as follows:

CONTRACT.

Whereas, the Board of Directors of the St. Francis Levee District owns considerable timber lands within its boundaries:

And Whereas, it is represented to its officers that certain persons have been trespassing and cutting timber upon said lands, and there are already suits instituted and in contemplation against such parties for the recovery of said timber, or the value thereof;

And Whereas, James Anthony is an experienced timber man and surveyor, and is acquainted with the said land;

Now, Therefore, the said Board of Directors of the St. Francis Levee District, for and in consideration of the services of the said James Anthony in securing evidence to enable said Board of Directors to recover said timber, or the value thereof, so cut by such parties so trespassing upon said lands, hereby agree to pay the said James Anthony twenty-five (25) per cent of all sums recovered and collected from parties so trespassing and cutting timber on said lands for the timber so cut by them.

And I, James Anthony, in consideration of such twenty-five (25) per cent, agree to keep watch over all of the said lands of the said Board of Directors, report the cutting of timber thereon by trespassers and collect and procure evidence thereof and furnish the same to the said Board to enable them to recover the said timber, or the value thereof.

Board of Directors, St. Francis Levee District.
By O. N. KILLOUGH, *President.*

Attest:
HUGH R. MCVEIGH, *Secretary.*
JAMES ANTHONY.

This is the original contract between myself and the St. Francis Levee Board. It is not true that in consideration of my services in procuring evidence to enable the said Board of Directors to recover said timber, or the value thereof, by such parties so trespassing upon said lands the Levee Board agreed to pay me twenty-five per cent of such sums collected. Nor is it true that it was necessary for me to furnish evidence that the Levee Board had some title to these unsurveyed lands. I did not undertake to furnish them evidence that parties were wrongfully cutting timber on these unsurveyed lands. The evidence I am giving in this case is not an attempt on my part to carry out that contract in favor of the grantees of the Levee Board. It was the part of the Levee Board to prosecute anybody for cutting timber on these lands, and it was not my contract to

show that the Levee Board had title. It was my contract, however, to furnish them the necessary evidence to prosecute people that depredated on their lands. This contract takes in the Levee Board unsurveyed lands as a whole—the tax-title lands and everything else. The suggestion that the Levee Board could claim title to these lands did not originate with me. I just simply for my own part was perfectly satisfied in regard to the title, and I told the Levee Board time and time and again that I was perfectly willing to take the title. I took an option on these unsurveyed lands at fifty cents an acre, and when the Levee Board transferred the lands to Bodkin, they were really carrying out their option to transfer their claim to them at fifty cents per acre. I paid the fifty cents per acre to the Levee Board in the fall of 1900. There was one other option out on these unsurveyed sunk lands, which are called the St. Francis Lake District, besides the one I held. They have conveyed to me six thousand acres in addition to the lands in controversy. I have not at the present time any contingent interest in the outcome of this litigation. My interest in the outcome of this litigation ceased in February, 1903,—February of the present year. I am at the present time the representative of the defendants in regard to these lands, and in regard to this suit. I said in my letter of May 20, 1902, to Charles M. Schierholz, from which you have been reading, as follows: "I also beg leave to inform you that two suits have been filed against us in regard to the title to these lands, and the courts of Arkansas have so far decided that the title is vested in the Board." That statement is correct so far as my conception of the case goes. When I also said in that letter, "I am under contract with the Levee Board to furnish the necessary information and prosecution for the recovery of such timber," I referred to the contract that has been introduced heretofore in evidence, and identified by me. When I signed this letter "James Anthony, C. E." I meant "Civil Engineer." "C. E." after a man's name, when he is a civil engineer, simply demonstrates the fact that he is a graduate, like "M. D." after a doctor's name. The Commercial Appeal made a mistake when it made the statement, "James

Anthony, who is in the employ of the St. Francis Levee Board, publishes the following in the Commercial Appeal." They naturally drew their own conclusions about that. I only handed them the letter just like Mr. Schierholz did his letter. This, however, is a correct copy of the letter as it was published in the Commercial Appeal. I have a copy of it here; I will give you the whole paper. When I said a little while ago that in February, 1903, my interest in this lawsuit ceased, except so far as I represented the defendants in the case in Arkansas, I simply meant that at that time the lands were sold to other people, and my interest in the lands ceased. It is true that long before that Mr. Bodkin had conveyed his claim or title to the land to H. C. Williamson. There were two deeds made,—one of them in November, and one in February, 1901. Bodkin transferred these lands to H. C. Williamson in 1901, and H. C. Williamson transferred these lands to Bigelow Brothers,—that is, this eleven thousand five hundred acres,—in 1901. Bigelow Brothers conveyed these lands to the Bauer Lumber Company of Indianapolis in February, 1903, and up to the time of the last transfer mentioned I was still interested in the claim of the Levee Board and its grantees to these lands. My interest in these particular lands was not evidenced by writing. My interest is the interest in the unsurveyed lands. You understand there are two tracts in here. This suit in question covers the Bigelow tract of eleven thousand five hundred acres; and outside of these lands I was interested in six thousand acres of similar lands. I am not still so interested. We have transferred the lands. In so far as the warranty deed goes, I have given these last gentlemen an assurance that I will furnish evidence to prove their titles to the lands similar to what I gave the Levee Board originally. I never signed any warranty deed to these unsurveyed lands, but I consider myself responsible for the covenants of warranty in the Bodkin deed; and in so far as the warranty deed goes, I have a vital interest in the determination of this controversy.

EVIDENCE IN REBUTTAL.

The plaintiff in error offered in rebuttal a quit

claim deed from the State of Arkansas to one W. D. Mallory to certain lands described as fractional S. ½ and fractional S. ½ of N. ½ of Sec. 28 and fractional N. ½ of Sec. 33, Township 12 North, Range 6 East, to show that the State of Arkansas has never claimed any title to the lands in controversy and has treated said lands as unconfirmed and unpatented from the United States to the State of Arkansas. The introduction of this deed was objected to by the defendants in error and the court sustained said objection and excluded said evidence, to which ruling of the court the plaintiff in error duly excepted at the time. See Bill of Exceptions on page 148 of transcript.

The deed last above referred to from the State of Arkansas to W. D. Mallory will be found on page 139 of transcript. This deed is in words and figures as follows:

THE STATE OF ARKANSAS.

To All to Whom These Presents Shall Come, Greeting:

Know ye that W. D. Mallory has this day purchased from the State of Arkansas the Fractional South Half and the Fractional South ½ of the North ½ of Section Twenty-eight (28) and the Fractional North Half of Section Thirty-three in Township Twelve North of the Base Line in Range Six (6) East of the Fifth Principal Meridian containing Five Hundred and Sixty-three and 36-100 (563.36-100) Acres the same being a portion of the Swamp and Overflowed lands selected by the State of Arkansas as inuring to the said State under the provisions of an Act of Congress of the United States of America entitled, "An Act to enable the State of Arkansas and other States to reclaim the swamp and overflowed lands within their limits." Approved 28th September, 1850, and which still remains unapproved and unpatented to the State of Arkansas by the General Government.

Now therefore I, C. B. Myers, Commissioner of State Lands in and for the State of Arkansas in pur-

suance of the provisions of an Act of the General Assembly, entitled "An Act to authorize the sale of swamp lands in certain cases" approved 18th March, 1879, and for the consideration of Seven Hundred and Four Dollars and twenty cents this day paid to the Treasurer of the State of Arkansas, being the amount in full for the purchase money for said land, the receipt for the same being now on file in my office, do hereby for and in behalf of the State of Arkansas grant, bargain, sell and convey to the said W. D. Mallory and to his heirs and assigns forever all the right, title, interest and claim the State of Arkansas has in and to the above described land together with all the appurtenances hereditaments thereunto belonging.

To have and to hold the same as now held by the said State unto the said W. D. Mallory and unto his heirs and assigns forever.

Provided, however, that if the land above described and conveyed is of the character not comprehended in the act of Congress granting the swamp and overflowed lands to the State of Arkansas, then and in that case the said W. D. Mallory shall have no claim or demand on the State of Arkansas for recoupment or otherwise.

In testimony whereof, I, C. B. Myers, Commissioner of State Lands for the State of Arkansas, have hereunto set my hand and caused the seal of this office to be affixed at the City of Little Rock, on this 28th day of October, 1892.

C. B. MYERS,

(SEAL) *Commissioner of State Lands.*

The Bill of Exceptions shows that all of the documents therein referred to were duly filed at the hearing and made a part of the record in this cause, and thereupon the Chancery Court of Poinsett County, Arkansas, rendered the following decree:

DECREE OF CHANCERY COURT.

Chapman & Dewey Land Company, Plaintiff,

vs.

Chas. H. Bigelow, N. P. Bigelow, L. T. Walker and F. H. Hartshorn, Defendants.

Comes the plaintiff, Chapman & Dewey Land Company, a corporation under the laws of the State of Missouri, by Henry D. Ashley, R. S. Rodgers and Frierson & Frierson, its solicitors, and the defendants, Chas. H. Bigelow, N. P. Bigelow, L. T. Walker and F. H. Hartshorn, by N. W. Norton, their solicitor, and this cause is submitted upon the complaint and answer, cross-complaint and reply thereto, and upon the exhibits to said pleadings, photo-lithographic plats, according to United States surveys, field notes, selections and approvals, patents, conveyances and documentary evidence; and upon the depositions of Geo. C. Peters, F. H. Varner, T. L. Davis, Jno. M. Biggs, Chas. S. Odom and James Anthony, and exhibits thereto; and upon consideration thereof and being duly advised, the court finds that the plaintiff is without title to the lands to which it seeks to have its title quieted in this action and is without equity to have the title of defendants thereto held void and invalid, the said lands being situated in the County of Poinsett in the State of Arkansas and described as follows:

All Section 1, all Section 10, all Section 11, all Section 12, all Section 13, all Section 14, all Section 23, all Section 24, all Section 26, all Section 34, all fractional Section 9, all fractional Section 15, all fractional Section 22, all fractional Section 25, all fractional Section 27, all fractional Section 28 lying east of the main channel of the St. Francis river, all fractional Section 33 lying east of the main channel of St. Francis river, as shown on said Anthony survey; all fractional Section 35 lying north and west of the meandered line as per original United States survey as shown by plats of date August 8, 1849; all fractional Section 36 lying north and west of the meandered line of the Lake or Sunk Lands

as per original United States survey, as shown by plats of date August 8, 1849; all fractional Section 2 lying south and east of meandered line as per original United States survey, as shown by plats of date August 8, 1849, all in Township 12 north of base line in Range 6 east of the Fifth Principal Meridian, all east of St. Francis river.

And all fractional Section 3, Township 12 north, Range 6 east, lying south of meandered line as per original United States survey as shown by plats of date August 8, 1849, 167.47 acres. All fractional Section 4, Township 12 north, Range 6 east, lying west and south of meandered line as per original United States survey as shown by plats of date August 8, 1849, 249.99 acres. All fractional Section 18, Township 12 north, Range 7 east, lying west of meandered line as per original United States survey as shown by plats of date October 27, 1845, 503.03 acres. All fractional Section 19, Township 12 north, Range 7 east, lying west of meandered line as per original United States survey as shown by plats of date October 27, 1845, 230.12 acres; and containing in all eleven thousand five hundred and forty-two and 96-100 acres (11,542.96), more or less. All according to the Anthony survey of September and October, 1900, recorded in Plat Book "B," pages 1, 2 and 3, with field notes for same in Plat Book "B," pages 5 and 6.

It is therefore by the court considered, ordered and decreed that the plaintiff take nothing by this action and that the plaintiff's complaint be and the same is hereby dismissed for want of equity; and that the defendants do have and recover of and from the plaintiff all costs incurred in this action for which execution may issue as at law, to all of which rulings and decisions of the court plaintiff excepts.

As this decree against the plaintiff in the original complaint determines the rights of the parties to the property, the injunction prayed in the cross-bill of defendants is unnecessary and on that account not ordered. And leave is given the parties hereto to withdraw all original deeds introduced in evidence in this case.

And the plaintiff prays an appeal to the Supreme

Court of the State of Arkansas, which is by the court granted, and plaintiff prays leave to file a bill of exceptions, which is allowed and ninety days granted in which to file bill of exceptions. (Transcript, p. 140.)

Thereafter the suit coming on regularly for hearing in the Supreme Court of Arkansas was submitted and the foregoing decree affirmed. (See transcript, p. 151.)

And the opinion of the court by Battle, J., (McCulloch, J., dissenting and Hill, C. J., absent) was as follows:

OPINION OF SUPREME COURT OF ARKANSAS.

92 S. W. Rep., 534.

BATTLE, J. Chapman & Dewey Land Company, a corporation organized under the laws of the state of Missouri, brought a suit against Charles H. Bigelow, N. P. Bigelow, L. T. Walker and F. H. Hartshorn to quiet title to certain lands, and for that purpose to have declared void and of no effect certain conveyances, under which the defendants claim title thereto.

Plaintiff claims title under an act of Congress entitled "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits," approved September 28, 1850. It alleges that, in pursuance of the provisions of this act, surveyed sections and parts of fractional sections in fractional township 12 north of the base line, in range 6 east of the fifth principal meridian, and in township 12 north of the base line, in range 7 east of the fifth principal meridian, and in Poinsett county, in this state, were duly selected, approved, and patented to the state of Arkansas, as a part of the swamp land-grant; that certain of these lands were conveyed by the state of Arkansas, on the 12th day of June, 1871, to Moses S. Beach, that plaintiff acquired and is the owner of these lands so conveyed to Beach as well as certain other of the lands which were deeded to the state of Arkansas by the United States; that many of the legal subdivisions of sections so acquired by plaintiff were bounded by a large body of non-navigable water called

in the official surveys of the United States and field notes thereof as the "Sunk Lands," "St. Francis River Sunk Lands," the "Hatchie Coon Sunk Lands," and the "Cut-Off Lake"; that the legal subdivisions so bounding were fractional, and in the survey were meandered along such body of water. The plaintiff, thereupon claims the lands lying under this body of water; and these are the lands in controversy in this suit to which it (plaintiff) seeks a decree to quiet its title as against the defendants.

Plaintiff alleges that these lands are wild, unimproved, and unoccupied; and that the defendants are claiming them under certain deeds; and asks that these be declared void, invalid, and of no force whatever.

The defendants answered and denied that the so-called "Sunk Land" was a body of water or that it is shown to be by the surveys of the United States or the field notes; but that it was sometimes temporarily flooded with water, and was land bearing "trees and vegetables, willow and cypress"; and that the meandered lines run as alleged by plaintiff were run as boundaries, and not for the purpose of finding the number of acres in the sections or legal subdivisions "for which purchasers would have to pay when the government might dispose of the land."

The chancery court, after hearing the evidence adduced by all the parties, dismissed the complaint for want of equity, and rendered judgment in favor of the defendants for costs; and the plaintiff appealed.

We have attempted to state briefly so much of the pleadings in the case as presents the issue for our consideration. Before noticing the facts we will consider the law of the case.

In *Hardin* v. *Jordan*, 140 U. S., 371, 11 Sup. Ct., 808, 838, 35 L. Ed. 428, the court, after an extensive review of authorities, held that, "by the common law, under a grant of lands bounded on a lake or pond which is not tidewater and is not navigable, the grantee takes to the center of the lake or pond, ratably with other riparian proprietors if there be such."

Horne v. *Smith*, 159 U. S., 40, 15 Sup. Ct. 988, 40 L. Ed., 68, was an action to recover the possession of certain lots. 'Plaintiff's title vested on a patent from the

United States, dated March 20, 1885, conveying 'lot numbered 7 of section 23, and the lots numbered 1 and 2 of section 26, in township 29 S., of range 38 E., of Tallahassee meridian in Florida, containing 170.42 acres, according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General.' The official plat of township 29 was in evidence, which showed that sections 23 and 26 were fractional sections bordering on the Indian river. On this plat a meander line runs through the sections from north to south, the Indian river being on the west thereof. The east line of the section is, so far as these lots are concerned, the ordinary straight line of government surveys. In the S. ½ of the S. E. ¼ of section 23 is lot 7. The area of that lot is given as 73.06 acres. The N. E. ¼ of section 26 is divided into lots 1 and 2. The area of lot 1 is 54.90 acres, and of lot 2, 42.53 acres. The boundary lines of these three lots are all straight, with the exception of the meander line on the west. The length of the section line between lot 7 and lot 1, extending from the east section line to the meander line on the west, is stated to be 30.55 chains. Along the course of this meander line, as shown on the plat, runs, according to the testimony, a bayou or savannah opening into Indian river, and west of this bayou, and between it and the main waters of the river, is a body of land extending in width a distance of a mile or a mile and a quarter, and amounting to some 600 acres. This is a body of low land, in some places, however, from 4 to 6 feet above the level of the river, and covered with a growth of live oak trees, many of them 3 and 4 feet in diameter. It was not land formed by accretion since the survey."

Mr. Justice Brewer, in delivering the opinion of the court, said: "But the question in the case is whether the boundary of these lots is the bayou or the main body of the river. That a water line runs along the course of the meander line cannot, of course, in the face of the plat and survey, be questioned, but that the meander line of the plat is the water line of the bayou rather than that of the main body of the river, is evident from these facts. In the first place, the area of the lot is given, and when that area is stated to be 170 acres, it is obvious

that no survey was intended of over 700 acres. In the second place, the meander line, as shown on the plat, is, so far as these lots are concerned, wholly within the E. ½ of sections 23 and 26, while the water line of the main body of the river is a mile or a mile and a quarter west thereof, in sections 22 and 27. Again, the distance from the east line of the section to the meander line is given, which is less than a quarter of a mile, while the distance from such east line to the main body of the river must be in the neighborhood of a mile and a half. Further, the description in the patent is of certain lots in sections 23 and 26, and, manifestly, that was not intended to include land in sections 22 and 27. These considerations are conclusive that the water line which was surveyed, and made the boundary of the lots, was the water line of the bayou or savannah, and there has been simply an omission to make any survey of the tract west of the bayou, and between it and the main body of the Indian river."

Again he says: "But it is said that because the water mentioned on the plat is called Indian river the boundary must be taken as the water line of the river, and cannot be that of any intermediate bayou. * * * In the case before us, obviously, the surveyors surveyed only to this bayou, and called that the river."

French-Glenn Live Stock Company v. *Springer,* 185 U. S. 47, 22 Sup. Ct. 563, 46 L. Ed. 800, was an action to recover possession of a certain tract of land. "To support its contention the plaintiff in error put in evidence at the trial, an official plat of the government survey of township 26 S., range 31 E. of the Willamette meridian, showing the township rendered fractional by abutting upon the meander line along the south side of Malheur lake, which plat appears to have been approved by the land department and filed in the local land office on September 17, 1877. The plat shows lots 3 and 4, section 34, and lots 1 and 2, section 35, as bounded on the north by the meander line of Malheur lake." The plaintiff in error purchased these lots of the state of Oregon. He contended that he bought in reliance upon plats and patents which showed the meander line of the lake, and that "such plats and patents must be deemed to conclusively

establish that the lake was the northern boundary of the land, so far as the rights of riparian grantees are concerned." The court held "that, while there was a lake abutting on or to the north of the lots, the plaintiff would take all land between the meander line and the water, and all accretions, it was competent for the defendant to show that there was not, at the time of the survey, nor since, any such lake, and to contend that, in such a state of facts there could be no intervening land, and no accretion by reliction."

In *Niles* v. *Cedar Point Club*, 175 U. S. 300, 20 Sup. Ct., 124, 44 L. Ed. 171, the facts are, in part, as follows:

"In the years 1834 and 1835, Ambrose Rice, a deputy surveyor, surveyed and subdivided into sections and quarter sections fractional township 9 S., in range 9 E., and townships 9 and 10 S., in range 10 E., the same being situated in the northern part of Ohio and adjacent to Lake Erie. From his field notes, duly certified to the surveyor general of that land district, the latter prepared a correct plat of the townships, showing the subdivisions thereof, and marking all the actual survey lines and the corners designated by said survey. By the field notes and plat, certain sections appear to be fractional, the line on the north being meandered in a general direction from the northwest to the southeast. The tract to the north of this line was described as 'flag marsh' and 'impassable marsh and water.' * * * "

"In 1881 John B. Marston, under instruction from the General Land Office, surveyed and subdivided into sections and quarter sections the area marked upon the surveyor general's plat, above referred to, as 'flag marsh' and 'impassable marsh and water.' * * * Disclosing the conditions of these lands, paragraphs 16 and 17 of the statement of facts are as follows:

" 'At the time of the making of the survey by Ambrose Rice the waters of Lake Erie were above their ordinary stage, and there was more than the usual volume of water standing upon the land in controversy herein and flowing to and upon the same from the large bodies of land now in Ottowa, Wood and Lucas counties, respect-

ively, having their drainage to and through the said premises in controversy herein.

" '(17) The general character, description and condition of the said lands surveyed by said Marston, was by him correctly set forth under the title 'General Description' in the field notes of the said survey so as aforesaid by him certified to the Commissioner of the General Land Office.

" 'That concerning the portion of said survey in township 9 S., range 9 E., reciting, to-wit:

" 'The surface of that part of this fractional township comprised in this survey, is covered with a deep marsh of grass, canes or reeds, wild rice, etc. Many parts of it, particularly in the south and west parts, are mown for a kind of coarse hay. Other parts are filled with bogs and pond holes that do not dry in summer. It receives the natural drainage from the woods on the south and west, which, without any well defined channel, finds its way across the marsh to the lake. Again, in heavy gales of wind it is subject to inundations from the lake, which, upon subsidence of the gale or change of direction in the wind, slowly finds its way out again into the lake. It is bounded along the lake by a sand beach averaging 1 chain in width and 3 feet in height.

" 'That concerning the portion of said survey in township 9 S., range 10 E., reciting, to-wit:

" 'The surface of this fractional township is covered with a deep marsh of grass, canes or reeds, wild rice, etc. Much of the south part can be mown for marsh hay, being in a measure drained by a canal that has been constructed in the township south. Other parts are filled with bogs and pond holes that do not dry in summer. It receives the drainage from the woods on the south and west, which spread over the entire surface and without any positive channel finds its way to the lake. Again the township is subject to inundations from the lake during heavy gales of wind, which, upon the termination of the gale or a change in the direction of the wind, slowly finds its way back into the lake.' "

We should have stated before this that "in July, 1844 (before the Marston survey was made), patents for

several of the fractional sections facing on the marsh were issued to Margaret Bailey, under whom the appellant claims; that the patents each recite the number of acres granted, and each states that the tract is a fractional section, 'according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Margaret Bailey.'" After the Marston survey the lands surveyed by him were patented by the United States, and the title so conveyed passed by subsequent deeds to the appellee. The controversy in the case was between the appellant, claiming it by virtue of its contiguity to other lands conveyed to his grantors by the United States before the Marston survey, and the appellee, who claims under a patent of the United States. The appellee's title was sustained.

Mr. Justice Brewer, delivering the opinion of the court, said: "Generally, these meander lines are lines which course the banks of navigable streams or other navigable waters. Here, it appears distinctly from the field notes and the plat that the surveyor, Rice, stopped his survey at this 'marsh' as he called it. These surveys were approved and a plat prepared, which was based upon the survey and field notes, and showed the limits of the tracts which were for sale. The patents, referring in terms to the survey and plat, clearly disclose that the government was not intending to and did not convey any land which was a part of the marsh. 'The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor general, thereby adopting the plat as a part of the instrument.' * * * In *James* v. *Howell*, 41 Ohio St., 696, 707, the supreme court of Ohio, speaking of these very patents and this marsh, said: 'The meander line along the southerly border of the marsh was, in fact, intended to be the boundary line of the fractional sections.'"

Again he said: "It is impossible to hold that the lower courts erred in the conclusion that this marsh was not to be regarded as land continuously submerged, either

under Lake Erie, a navigable lake, and in that case belonging to the state of Ohio, * * * under a pond or other similar body of non-navigable inland waters, and therefore generally the property of riparian owners. It was called a marsh by Rice, the first surveyor, is so styled on the plat, and the conditions as disclosed by the agreed statement indicate that it was a body of low swampy land, partly boggy and partly dry, sometimes subject to inundations from Lake Erie or the overflow of the adjacent streams, but not permanently covered with water.

* * * * * * * *

"But it is urged that the fact that a meandered line was run amounts to a determination by the land department that the surveyed fractional sections bordered upon a body of water, navigable or non-navigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; and this in face of the express declaration of the field notes and plat, that that which was lying beyond the surveyed sections was 'flag marsh,' or 'impassable marsh and water.' But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land, or water, government or Indian reservation."

In suits to quiet title the plaintiff is not entitled to recover unless he be in possession, or his title be equitable, or, having the legal title, the land be wild and unoccupied. *Mathews* v. *Marks,* 44 Ark., 436; *St. Louis Refrigerator & Wooden Gutter Co.* v. *Thornton* (Ark.) 86 S. W., 852. The lands in controversy are wild and unoccupied. The possession of them follows the title. Hence, appellant "must succeed, if at all," as in actions of ejectment, "upon the strength of his own title, and cannot rely upon the weakness of his adversary's"; and the burden is on it to show title. *Lawrence* v. *Zimpleman,* 37 Ark., 644, 647; *Kelley* v. *Laconia Levee District* (Ark.) 85 S. W., 249, 250; *St. Louis Refrigerator & Wooden Gutter Co.* v. *Thornton* (Ark.) 86 S. W., 852, 853.

Appellant claims the land in controversy by virtue of the contiguity of certain lands, acquired by it from the

United States, through the state of Arkansas and other grantors, to what is called "Sunk Lands" and "Cut-Off Lake." This "Sunk Land" from appellant's land on one side to the St. Francis river, a navigable stream, on the other, is there four and six miles wide. In this area there are over 10,000 acres. The field notes and plat introduced as evidence show the condition of only those sections, and that was on the 30th of May, 1849. John W. Garretson, who surveyed the subdivisional lines and meanders of township 12 N., range 6 E., made this note in his record of surveys:

"May 30, 1849. The water is at a medium stage at this time, and it is utterly impossible to get to the part of the south boundary of section 36, T. 13 N., R. 6 E., which was run by Mr. James M. Danley. The Hatchie Coon Sunk Lands, on the west side of which I closed the meanders in Sec. 2, T. 12 N., R. 6 E., is so deep at this time that it cannot be waded. The east boundaries of Secs. 24 and 25, T. 12 N., R. 6 E., I passed in December, 1848, in a canoe, there was water there on them then from eight to ten feet deep, and no timber except groups of willow and small cypress trees, such as grow in the main sunk lands of the St. Francis river. Mr. Samuel Johnson, it seems, established corners in this lake, as it is called, on the north side of the right-hand chute of Little river, which right-hand chute is very similar to the ground through which the lines, viz., east boundary of Secs. 24 and 25, T. 12 N., R. 6 E., runs. I have stated this much in order to show the utter impossibility of running lines or meanders from any corners on the above named boundaries, only at the dryest season of the year. The part of the ground through which east boundary of Secs. 24 and 25 lies is called Cut-Off Lake, and the south boundary of Section 36, T. 13 N., R. 6 E., could not be reached by Mr. Samuel Johnson, who run the east boundary of T. 12 N., R. 6 E., at the time he run said boundary.

"JOHN W. GARRETSON, *Deputy Surveyor.*"

He indirectly says the lands mentioned could be surveyed at the dryest season of the year, and says that two of the sections had on them "groups of willow and small cypress trees."

The maps introduced as evidence in the hearing of this cause show that fractional sections 6, 7, 18, 19, 30, 35 and 36 form the western boundary of what is called "Sunk Lands," in controversy. James Anthony, an experienced and skilled civil engineer, testified that in 1876 he found that the government meander line of these sections followed the old steamboat channel, known as the "Old River," which at one time was navigable. The fact that the meander lines followed the channel of Old River is *prima facie* evidence that it was the water line of these sections when the meander lines were run, and was the stream meandered.

The official maps show that Cut-Off Lake was the water boundary of fractional sections 35 and 36.

What lay beyond these water lines or boundaries in what is called "Sunk Land?" These sections were surveyed by the government about 1848 or 1849. They were conveyed by the United States to the state of Arkansas by two patents dated, respectively, July 29, 1852, and September 27, 1858; and the state conveyed all of them, except sections 6 and 7, on the 12th of June, 1871, to Moses S. Beach, from whom appellant deraigns title. On these various dates there is no direct evidence to show the condition of the lands in controversy. Claiming them by virtue of its riparian rights the burden is upon appellants, if it succeeds at all, to show their conditions. It has failed to do so.

James Anthony, who has known the land since 1874, three years after the state of Arkansas conveyed lands to Moses S. Beach, as before stated, testified as follows:

"Timber grows all over the land; cypress and cottonwood on the outskirts of that land, both on the river and on the meander line. The center of the land in section 10, 15, west half of 11, west half of 14, is the highest land in that country, comparing it with both sides of the river, and it is known as 'Gum Island,' and the timber on these lands, this 10, 15, west half of 11, and west half of 14, are oak, some cottonwood, red gum, mulberry, some hickory, and is also covered with a dense undergrowth of spice wood. Between these lands, which I have said are known as 'Gum Island,' and the land within the meander

line, known as 'Hatchie Coon,' the country is low, swampy, and in some places going as wide as 1,000 and 1,200 feet between high land and high land, and narrowing down in places to 75 and 100 feet wide.

"I have followed the meander line through 4 and 3 and 2, about which Mr. Biggs and Mr. Odom testified. I made those meander lines. As to the difference in the timber and land on one side of that line and the other, the timber on the 'Hatchie Coon' property is oak and gum, and on the south, in between the two islands, cypress principally and some little cottonwood. I have known that country since 1874. It is known as the 'Sunk Lands.' It is possible at times to walk across that country. The best crossing is through 6, 12, 11 and 10, and through 9. There is an old wagon road that goes through there, and there used to be a ferry. By 6 I mean sections 6 in 12—7.

"Asked as to the nature of the country south of this crossing, with reference to the possibility of being crossed by team or horses or by foot, the witness said: 'Well, what you call by foot, you mean across this country anywheres, as far as wagons are concerned you would have to leave these middle sections out, and then you could cross through 35, 34 and 33 with wagon or otherwise.'

"It could not be crossed on foot in the S. ½ of 24 and the S. ½ of 22. By wading you can cross anywhere. There is water in section 23. There may be a little flag in 14. The flag openings commence in the northeast corner of 2. They go down through section 2 to the E. ½ of section 11. The E. ½ of 14 and from the south line of section 14 they turn due west, running out between sections 14 and 23 and 15 and 22, and is here known as 'Lead Fork Slough.' In section 26 there is what is known as the 'Scatters.' That is, more or less over the section, there is bunches of timber covering 25 or 30 acres, and these bunches of timber are surrounded by flag openings. There may also be a little of that in 25, but very little. 25 is pretty high ground, it is ash and oak. 25 is known as 'Ash Camp.'"

This testimony is strongly corroborated by the testimony of other witnesses.

Were the lands in controversy higher in 1874, and since then than they were in 1848, when the United States survey was made, or in 1852 or 1858 when the United States conveyed to this state?

T. L. Davis testified that "there is sediment always forming, and after every overflow there is sediment found, and the land is gradually rising up." F. H. Varner testified that he had resided not far from this land ever since 1844 (four years before any survey was made) that low places filled with water are gradually filling up, but further than this the land has not been elevated. John M. Biggs testified that he does not think that the land has filled up or been elevated any at all. That the overflows wash out these low places and prevent them filling; that nearly everywhere on what is known as "Sunk Lands" on top of the ground, there is an ore-like substance in pieces as heavy as a pound to five pounds. This clearly indicates that the lands have not been materially elevated by sediment deposited on top of the ground. If it was the ore would be covered. The preponderance of the evidence, we think, shows that the elevation of the "Sunk Lands" has not changed.

According to the opinion of the court in *Horne* v. *Smith*, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed., 68, and *Niles* v. *Cedar Point Club*, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed., 171, we do not think that the appellant acquired the lands in controversy by virtue of his riparian rights, or is the owner thereof, and so decide. Like the land in controversy in *Niles* v. *Cedar Point Club, supra*, they are low swampy lands, checked by bayous, subject to inundation, and reclaimable, to some extent, for agricultural purposes; and not such lands as can be acquired by virtue of riparian rights for fishing and other water purposes.

Appellant offered a letter of the Secretary of the Interior of the United States to the Commissioner of the General Land Office as evidence, and the court refused to receive or allow it to be read. The letter was a mere expression of opinion as to the lands in controversy. There was no contest before his department as to such lands which called for decision. There were no parties before him seeking for an adjudication. There were no issues

to be decided. No one interested had an opportunity to be heard. The letter was of no binding force or effect upon any one, and was properly excluded.

Decree affirmed.

McCULLOCH, J., dissents. HILL, C. J., absent.

Transcript, pp. 151- 159.

FEDERAL QUESTIONS INVOLVED.

The opinion of the supreme court of Arkansas above set forth held in substance and effect as follows:

1. That the *locus in quo* was land at the date of the surveys made under the direction and authority of the General Land Office of the United States, and at the date of the grant from the United States to the state of Arkansas of the adjacent surveyed lands, and was not a single permanent body of water as indicated by said surveys, and the field notes and plats thereof duly returned to the General Land Office by the Surveyor of Public Lands of the United States in and for the state of Arkansas, except that around a portion of said *locus in quo* the meander lines shown on the plats of said United States surveys, were in fact run along a channel not shown or designated in any of the field notes or plats of said official survey, and along a body of water shown and designated in said plats and field notes as "Cut-Off Lake," and that beyond said channel and beyond said "Cut-Off Lake," the *locus in quo* at the date of said surveys was land, said plats and field notes to the contrary notwithstanding.

2. That the physical condition of the *locus in quo* has not changed since the making of the surveys aforesaid, and that the portions of said *locus in quo* lying beyond said alleged channel, and beyond "Cut-Off Lake," was, in fact, land at the date of said surveys and at all times since, said plats and field notes to the contrary notwithstanding.

3. That a certain note dated May 30, 1849, among the field notes of said United States surveys, indirectly showed that the *locus in quo* might have been surveyed in the driest season of the year.

4. That the ruling of the Secretary of the Interior contained in the letter hereinbefore set out, finding the *locus in quo* to have been at the date of said surveys, a permanent body of water, was of no binding force or effect upon anyone and was properly excluded in this cause.

5. That the court could legally make inferences from the oral evidence introduced herein as to conditions of the *locus in quo* twenty-five to fifty years after the official surveys that such *locus in quo* was not a permanent body of water, when surveyed, but was then land, the plats and field notes and the finding of the Secretary of the Interior based thereon to the contrary notwithstanding.

Hence this suit has necessarily involved and there have been raised and presented by plaintiff in error from the beginning of the original trial in the chancery court of Poinsett County, Arkansas, the following Federal questions decided adversely to plaintiff in error and all set out in petition in error.

"First. Whether said surveys and the field notes and plats thereof made under authority of the United States, are not upon the entire record in this case conclusive evidence of the existence at the time the same were made and on the 28th day of September, 1850, of a permanent body of water covering the *locus in quo*.

Second. Whether said surveys and the field notes and plats thereof, made under authority of the United States, were erroneous and failed to properly show and truly represent physical conditions existing in and about the region surveyed at the date of said surveys.

Third. Whether the field note dated May 30th, 1849, hereinbefore mentioned, could properly be construed as showing or tending to show, that the entire *locus in quo* was, at the date of said survey, land, and not a permanent body of water.

Fourth. Whether the finding of the Secretary of the Interior contained in his said letter of November 17th, 1902, based on said plats and field notes, to the effect that the *locus in quo* was a permanent body of water at the date of said surveys, was properly excluded in this cause.

Fifth. Whether said finding of the Secretary of the Interior was of no binding force or effect in this cause for any purpose.

Sixth. Whether under and by virtue of the official record of said surveys made under authority of the United States and under and by virtue of the laws of the United States, and especially the said act of Congress of September 28th, 1850, and patents issued by the United States, and the rules and regulations of the General Land Office of the United States, and the rulings of the Commissioner of said General Land Office, and of the Secretary of the Interior, and the adjudications of the supreme court of the United States, the *locus in quo* does not belong to your petitioner as riparian owner, there being no law of the state of Arkansas affecting riparian rights to the contrary.

Seventh. Whether under and by virtue of the official record of said United States surveys, and under and by virtue of the laws of the United States, and especially the said act of Congress of September 28th, 1850, and patents issued by the United States, and said rules and regulations of said General Land Office, and said rulings of the said Commissioner of the General Land Office, and of the Secretary of the Interior, and the adjudications of the supreme court of the United States, your petitioner

is not entitled in equity to have its title to the *locus in quo* quieted as against the claims of the defendants in error, the said deeds under which the defendants in error claim declared invalid, void and of no force and effect, and the prayer of the plaintiff's petition in said cause granted.

Eighth. Whether the said letter of the Secretary of the Interior of November 17th, 1902, is not conclusive on any or all the following points:

1. That the said surveys made under the authority of his department and the official plats and field notes of said surveys show that at the date of said surveys the *locus in quo* was a permanent body of water.

2. That the *locus in quo* has never been surveyed under authority of the United States and has never been selected by the state of Arkansas as land inuring to it under the act of Congress of September 28th, 1850, has never been confirmed or approved to said state as swamp or overflowed land by the Secretary of the Interior, and has never been patented to said state by the United States as swamp or overflowed lands.

3. That the *locus in quo* was on September 28, 1850, a permanent body of water.

4. That the state of Arkansas never acquired the *locus in quo* as swamp or overflowed land inuring to it under said act of Congress of September 28, 1859, but did acquire it by virtue of the riparian rights which passed to said state by patents from the United States, conveying under said act of September 28, 1850, the surrounding surveyed lands.

5. That the *locus in quo* does not belong to the United States.

6. That the *locus in quo* belongs to the riparian owners, there being no law of the state of Arkansas concerning and affecting riparian ownership, to the contrary.

SPECIFICATIONS OF ERROR.

Substance of oral testimony admitted over the objection of plaintiff in error.

WITNESS JOHN M. BIGGS. (Tr., 117.)

Live at Marked Tree, Arkansas, age 36, occupation hunter and trapper.

Have been familiar with "Sunk Lands" in Township 12, Range 6 East, Poinsett County, Arkansas, since 1888; *have hunted and trapped over it;* also helped Odom survey east of the river few days before.

Here follows testimony as to present condition of *locus in quo*:

"Q. Mr. Biggs, are there any places in that territory we have been talking about where there is an ore-like substance on the soil? A. Yes, sir, all over pretty near everywhere on the land, in the sloughs and even on the high land you can find it.

Q. What appearance has it? A. It looks a good deal like stone coal.

Q. When you meet with that what size places is it on? A. It is all over the land in pieces as big as a pound to five pounds."

Above testimony about the ore-like substance is quoted because Judge Battle in his opinion draws inferences from these few lines which plaintiff in error confesses his inability to follow.

Cross-Examination.

This unsurveyed region between Hatchie Coon Island on the north, the Government meander line between 6, 7 and 18 on the east and the Government meander line in 35 and 6 of the south is what is known as "St. Francis Lake." *Have known that territory since* 1885, *constantly since* 1888.

The balance of Biggs' testimony is simply on present conditions.

WITNESS CHARLES E. ODOM. (Tr., 126.)

Residence, Memphis, Tennessee. Have been a surveyor for two years. Am the Odom that went with Biggs over meander lines as an employee of James Anthony & Co., representing the defendant. *Went to locus in quo for above purpose on August* 18, 1903.

Am not familiar with land in question.

WITNESS JAMES ANTHONY. (Tr., 128.)

Am a surveyor connected with defendants in this case. Employed Odom to investigate the meander line and character of lands it runs through for Bigelow Brothers.

Identifies Anthony Plat "filed for record in Poinsett County, Arkansas, as what is called "The unsurveyed land intersections."

Have known this country since 1874.

A. "The meander line through Sections 6, 7, 18 and 19 on down until the meander line intersects the "Scatters" follows the old steamboat channel known as the "Old River" channel. Long years ago the Old River channel was opened and navigable for boats, and during the fall of 1876 was used as a clearer and better channel than the main St. Francis.

The St. Francis channel from the upper end of Hatchie Coon Island or Deep Landing, during the fall of that year, was so covered and filled up with sunken logs that it was impracticable to use the main channel of the St. Francis river during that distance.

For a complete abstract of Anthony's entire testimony, see ante, p. 26.

The only oral testimony offered by defendant in error was testimony of these three witnesses, Biggs, who had not known the region at all earlier than 1885; Odom, who stated he was not familiar with the region and appears never to have been below the north township line of Township 12, Range 6, until that August 18, 1903,

when he went with Biggs; and Anthony, who didn't pretend to have known the region prior to 1874. None of them even pretend to testify as to conditions earlier than 1874.

FIRST SPECIFICATION OF ERROR.

The error of both the Chancery Court of Poinsett County, Arkansas, and of the Supreme Court of Arkansas in admitting receiving and basing a decree on this incompetent oral evidence, thus impeaching and contradicting the official field notes, plats, surveys and patents all made under the direction and authority of the Land Department of the United States. None of said witnesses knew anything or attempted to state anything as to the condition of *locus in quo* at the time of such official surveys (1840 to 1849) earlier than 1874, and all such testimony was received over the specific objections of plaintiff in error.

See ante, p. 25, and more in detail pp. 147 and 148 of transcript.

SECOND SPECIFICATION OF ERROR.

The admission and reception of same oral evidence of same three witnesses to impeach and contradict the official finding of the Land Department and Secretary of the Interior made as to the identical *locus in quo* in proceedings originally initiated by the St. Francis Levee Board, grantors of defendants in error, based on said official field notes, surveys, plats and patents that the *locus in quo* was a permanent body of water. See *ante*, p. 19, where the Secretary says "Therefore, the conditions existing at the date of the township surveys is the important fact to be ascertained in order to determine whether steps should be taken to prevent depredations on these lands. The returns of the township surveys show upon their face that what are now alleged to be unsurveyed

portions of said townships were then actually bodies of water and were properly meandered as such.

There is nothing in the report of the Special Agent, or in any of the papers submitted therewith to impeach those returns as to the physical conditions of land and water at that time."

THIRD SPECIFICATION OF ERROR.

The supreme court of Arkansas erred in its holding that the surveys and field notes and plats thereof introduced in evidence by plaintiff in error (see transcript, p. 142) and made under the direction and authority of the General Land Office of the United States did not show the true physical condition of the *locus in quo* at the date of said surveys, and in holding that said *locus in quo* was not a permanent body of water at the date of said surveys, but was land at the date of said surveys.

FOURTH SPECIFICATION OF ERROR.

The Supreme Court of Arkansas erred in holding in effect that the title of the *locus in quo* is in the United States, and therefore not in the plaintff in error as riparian owner, especially as the Land Department of the United States has officially ruled that these lands belong not to the United States, but to the riparian owner. See opinion of Judge Battle, *ante,* page 39.

FIFTH SPECIFICATION OF ERROR.

Said Supreme Court of Arkansas erred in construing a certain note among the field notes of the United States Survey of Township 12 North, Range 6 East, as showing or tending to show that the *locus in quo* at the date of the survey was land and not water, especially as such field note was before the Secretary of the Interior when he officially found the *locus in quo* to have been at date of survey, water, not land.

See Judge Battle's opinion, *ante,* p. 47.

SIXTH SPECIFICATION OF ERROR.

Said Supreme Court of Arkansas erred in not holding the bottom of Cut Off Lake to belong to plaintiff in error as riparian owner after finding that said Cut Off Lake was a water boundary at the date of said United States Surveys of certain surveyed fractional sections admitted to belong to plaintiff in error.

See opinion of Judge Battle, *ante*, p. 48.

Judge Battle says: "The official maps show that 'Cut-off Lake' was the water boundary of fractional Sections 35 and 36."

SEVENTH SPECIFICATION OF ERROR.

Said Supreme Court of Arkansas erred in holding the letter of the Secretary of the Interior dated November 17, 1902, to have been properly excluded from evidence, and wholly disregarded by the Chancery Court of Arkansas, and in holding that said letter was of no binding force or effect upon any one.

See opinion of Judge Battle, Trans., p. 159. Also petition and assignment of errors, transcript, p. 15 *et seq.*

Also Bill of Exceptions, p. 145-146 and 147 of transcript, for offers for various purposes and rulings of trial court thereon with exceptions of plaintiff in error to such rulings.

EIGHTH SPECIFICATION OF ERROR.

The Supreme Court of Arkansas erred in affirming the ruling of the Chancery Court of Arkansas dismissing the complaint of plaintiff in error, and in not reversing said decree, and in not rendering a decree as prayed in said complaint. (Tr., 31.)

Also for offer and exception to ruling, transcript, p. 148, bottom.

STATEMENT AND ARGUMENT ON THE FACTS ACCORDING TO OFFICIAL SURVEYS.

For Government Plats, see Transcript, pp. 33 to 34.

For Government Field Notes, see Transcript, pp. 37 to 47.

For Selections and Approvals, see Transcript, pp. 48 to 49.

For Patents to State, see Transcript, pp. 35 to 36.

For Patents from State, see Transcript, pp. 50 to 52.

The selections, approvals and patents from the United States to the State of Arkansas of lands in Township 12 North, Ranges 6 and 7, called for the "whole of fractional Township" 12 North, Range 6 East, containing 7,236.78 acres, and the "whole of" Township 12 North, Range 7 East, except Section 16, containing 13,-815.67 acres. The two townships had been previously surveyed under direction of the United States Land Department by Samuel Johnson and John W. Garretson, (See township plats with transcript.) The east boundary of Township 12, Range 6, was surveyed by Samuel Johnson in October, 1840. His survey showed that in October, 1840, a body of water prevented the running of a line as the east boundary, except along the east side of fractional Section 36, in Township 12, Range 6, and the west side of Section 30, in Township 12, Range 7. Over eight years later, in December, 1848, and May, 1849, the subdivisional lines and meanders of Township 12, Range 6, were surveyed by John W. Garretson, and his survey showed water to still exist where shown by Samuel Johnson in October, 1840. The south boundary of Township 12, Range 6, was surveyed by Garretson in December, 1848, and shows a body of water then existing and reaching from fractional Section 35 to fractional Section 32 and no south boundary line of the township was run where this body of water appears on the township plat.

All of these surveys, made at widely different seasons of the year and by two different surveyors, who made their surveys over eight years apart, exactly agree in showing the existence, at all said times, of the body of water which made the township fractional.

The west boundary line of Township 12, Range 7, which was also the east boundary line of Township 12, Range 6, already referred to, is shown to be only 1 mile 59 chains and 64 links in length along fractional Sections 31, 30 and 19 in Township 12, Range 7. This was surveyed by Samuel Johnson in October, 1840. The sub-divisional lines and meanders were surveyed by Johnson in October and November, 1840, and July, 1841. His survey agrees with all the other surveys and shows fractional Sections 6, 7, 18 and 19 to be bounded by the same body of water referred to and shown by all of these surveys.

There is nothing on the official plats or in the field notes in any way indicating that the water marked "Sunk Lands" was any less permanent than that marked "Cut-Off Lake" or that marked "Right Hand Chute of Little River." In fact these names are shown as indicating different portions of one large body of water.

The Secretary of the Interior in his finding and opinion of November 17, 1902, which has been already referred to, holds that these surveys show the existence at the time they were made of a permanent body of water on which the land in these townships was meandered.

It is admitted by the defendant in error that the plaintiff in error is the owner of the fractional sections shown on the Government plat of Township 12 North, Range 6 East, meandered on the water shown on said plat, and lying east of the St. Francis river as it is shown on the Anthony survey. It is also admitted by the defendants in error that the plaintiff in error is the owner

of fractional Sections 18 and 19, Township 12 North, Range 7 East, which were meandered upon the same body of water above mentioned. The plaintiff in error's title to fractional Sections 6 and 7, Township 12 North, Range 7 East, is proven by conveyances and decrees put in evidence without objection at the trial.

The Government surveys and plats show that all of the above mentioned fractional sections were made fractional by said body of water and that the same body of water also made both the above mentional townships fractional. These surveys and plats show that the greater part of the west exterior boundary of Township 12, Range 7, was the water which made Sections 6, 7, 18 and 19 in said township fractional. The said official plat of Township 12 North, Range 6 East, states the sum of all areas therein to be 7,236.78 acres, and the said official plat of Township 12 North, Range 7 East, states the sum of all areas therein to be 14,829.97 acres.

The smallness of these areas was caused by the body of water above mentioned, and it was these surveyed areas that were selected, approved and patented to the State, not the unsurveyed water which bounded them. Township 12, Range 6, was expressly designated "fractional" in the selection, and in the patent thereof to the State. The thing that made it fractional was this water which was the boundary of the land granted.

While the selection and patent of Township 12, Range 7, conveyed the "whole of the township, except Section sixteen," the plat, survey and acreage show that it was and is a fractional township; and as the water line meandered along Sections 6, 7, 18 and 19 is an exterior line of the township, everything west of this water line is outside of the township and a grant to the state of the whole township could not convey, as a part of the township, itself, anything outside of one of its exterior boundaries, which, in this case, was the water line as

meandered on the official plat. The defendants in error in their answer have expressly and with great particularity, stated that these meander lines were run as boundaries, and it is wholly inconsistent for them, in the face of this statement to contend, as they do, that the grant to the State from the United States extended beyond these boundaries, while the subsequent grants from the State to its own patentees along the same meander lines did not extend beyond them. The truth, however, is that the meander lines were run, not as boundaries, but to show the sinuosities of the water which was the real boundary; and whatever rights the State acquired beyond the water line, were riparian rights, incident to the main grant and passed from the State to its grantees as riparian owners in the same way that they were acquired by the State.

It is admitted that the region shown as water on the Government plats has never been surveyed by authority of the United States.

There is nothing to show that the State ever regarded this unsurveyed region as land inuring to itself as swamp land under the Swamp Land Grant. There is evidence in the case to show that it did not so regard it. See deed from State of Arkansas to W. D. Mallory hereinbefore set out in the abstract and also in the transcript at page 139.

There is no evidence that the State ever applied to the United States Land Department to have this region surveyed so that it might be legally identified, selected, approved and patented to the State as swamp land. During the fifty-six years that have now elapsed since the passage of the Swamp Land Act of 1850, it does not appear that the State or the St. Francis Levee District ever claimed any ownership of these lands prior to 1900. The St. Francis Levee District was created in 1893 and the act of Legislature donating State lands to the St.

Francis Levee District was passed in 1893. The official finding of the Secretary of the Interior hereinbefore referred to, offered in evidence and made a part of the record in this case (see ante, pages 15, 17), shows that the Board of Directors of the St. Francis Levee District, treating these unsurveyed regions as still belonging to the United States, through its Chief Engineer, suggested to the Commissioner of the General Land Office, in a communication dated June 25, 1894, that these unsurveyed lands be donated by the United States to the State or to the St. Francis Levee Board; and it appears that subsequently, in 1901, the matter was again brought before the Land Department by the St. Francis Levee Board, and that the purpose of this action on the part of the Levee Board was to get the land on the Levee Board's tax books, so that it might be taxed for levee purposes, and that to accomplish this the Levee Board suggested that the lands should be surveyed under authority of the United States Land Department and sold by the Government to individuals who might homestead them.

(See ante, page 18.)

In the government plats and field notes the body of water shown on the township plats is designated variously as "sunk lands," "Cut-off lake," "a large lake," "sunk lands on the left bank of the St. Francis river," "St. Francis river sunk lands," "sunk lands on the left bank of the right hand chute of Little river," and "Hatchie Coon Sunk Lands," and this body of water is treated in all these surveys and the plats thereof as a single large lake through which the St. Francis river ran from north to south and through the southeast part of which the right hand chute of Little river flowed. The channel of the St. Francis river is definitely located on the Anthony plat, and, in the absence of proof to the contrary, this will be presumed to have been always its

location. The part of the bed of the lake which is now in controversy lay to the east of this channel. The plaintiff in error's ownership by riparian rights of the lake bottom which attached to the fractional sections around it, embraces the entire bottom of this lake east of the St. Francis river, as it is admitted to be located, and if this river is a navigable stream, this ownership extends to the east bank of the river; if unnavigable, to the middle thread thereof.

The Supreme Court of Arkansas erroneously construed a field note of John W. Garretson, a government surveyor, dated May 30th, 1849 (Transcript, page 115), made at the time of his survey of the *locus in quo* as a ground for its decree against the title claimed by the plaintiff in error. This field note is set out in full in the opinion of the Court. (Transcript, page 157). The Court, as we understand its opinion, holds that in this note the surveyor "indirectly says that the *locus in quo* might have been surveyed at the driest season of the year. A reading of this field note will, however, show that what was there said applied only to that part of the *locus in quo* which would have formed sections 24 and 25, township 12, range 6, had it not been covered by water, which the surveyor says was from 8 to 10 feet deep when he passed it in a canoe at so late a season of the year as December, 1848, and to that part which immediately adjoined section 36, township 13, range 6 on the south, which he says, on May 30th, 1849, was then covered by water so deep that it could not be waded. He was merely giving his reasons for not running lines or meanders for the very small part of the *locus in quo* which immediately adjoined the fragmentary exterior township boundary lines that appeared from surveys previously made by other surveyors. What he says cannot be construed to even inferentially intimate a possible sur-

vey at any season of the year of any part of the region in question other than the very small part of which he was speaking, nor does it amount to proof that even the small part referred to could be surveyed, at the driest season of the year. He speaks of it as a lake and says that it was then called such, and says that on May 30th, 1849, the water was "at a medium stage" and speaks of the "Hatchie Coon Sunk Lands" as "being so deep at this time that it cannot be waded."

This field note confirms the plats, in that it shows the permanent character of the water which covered the region in question. If this was a mere temporary overflow, it is indeed strange that the surveys of two different surveyors beginning in 1840 and ending in 1849, and made variously in the months of October, November, December, May and July, should all agree in showing at all said times the presence of the same body of water. The plaintiff in error, claiming title by reason of the facts proven by those surveys, is entitled to the benefit of their true meaning.

Moreover, this remark by Surveyor Garretson was with all the field notes and facts before the Land Department and the Secretary of the Interior when he officially found that the *locus in quo* was a permanent body of water at the time of these surveys, in the following language:

"The field notes and plats of these surveys show that what are now reported to be unsurveyed lands were at the date of the township surveys covered by permanent bodies of water that were meandered as lakes and rivers, having a depth, as shown by the field notes, varying from 5 *to* 15 *feet."*

REVIEW OF WITNESS ANTHONY'S TESTIMONY.

See Transcript, pages 128 to 138.

In 1900 one James Anthony, a civil engineer in the employ of the St. Francis Levee District, conceived the

idea that the St. Francis Levee Board, which had unsuccessfully applied to the Land Department of the United States to have the *locus in quo* surveyed and patented to individuals for the purpose of getting it on the levee tax books, might itself induce speculators to accept a conveyance from the Levee Board of the *locus in quo* on the theory that it had passed to the state of Arkansas as swamp land under the Swamp Land Grant, and to the St. Francis Levee District under the donation act of 1893. Thereupon Anthony made the survey, the plat of which he filed in the recorder's office of Poinsett county, and which will be found inserted at the front page of this brief. No speculators of sufficiently venturesome spirit being forthcoming, Anthony himself took an option from the Levee Board on this unsurveyed region at fifty cents per acre. This option was taken in the name of one Charley Bodkin (see Anthony's deposition, page 132 of Transcript), but was assigned to Anthony. A deed was afterwards made to Bodkin by the Levee Board, but in Anthony's interest; and Anthony himself says that he paid the fifty cents per acre. Anthony's contract with the St. Francis Levee Board was that, in consideration of his services in securing evidence to enable the Board to recover for the value of timber cut on these unsurveyed lands, the Board was to pay him twenty-five per cent of all sums recovered and collected from the timber cutters. Anthony says it was his duty under that contract to furnish the Levee Board with the necessary evidence to prosecute people that depredated on their unsurveyed lands. The Levee Board through its Chief Engineer had applied to the United States Land Department to have these very lands surveyed for the purpose of having them pass into the hands of private parties, and thus get them on the tax books, really disclaiming title itself; and yet it enters into an arrangement with Anthony for the

prosecution of those cutting timber on these unsurveyed lands, the title to which it was not then claiming. Anthony is the representative of the defendants in regard to these lands, and in regard to this suit, and has given "these gentlemen" who purchased from Charley Bodkin (the straw grantee of the Levee Board), assurance that he will furnish evidence to prove their title to the *locus in quo*.

He never signed a warranty deed to these unsurveyed lands, but considers himself responsible for the covenants of warranty in the Bodkin deed. In so far as the warranty in that deed goes, he admits that he has a vital interest in the determination of this controversy. It will be readily gathered from any unprejudiced reading of the Anthony deposition, viewed in the light of his officious making of the private survey of this unsurveyed region, that the real parties to this suit are the plaintiff in error, who bought in good faith all the surveyed land around this body of water in full reliance on the United States and state patents under which it derived its rights, as a riparian owner, to go to the St. Francis river, and a speculating engineer who persuaded the Levee Board to give him an option on the *locus in quo* which both the Levee Board and Anthony knew had never been surveyed or patented to the state, and which the Levee Board had unsuccessfully tried to get the United States Land Department to survey and patent to third parties. Finally the Levee Board makes a deed to Bodkin at fifty cents per acre, though this same Anthony is the real purchaser. This imaginary title has been conveyed from Bodkin to Williamson, and from Williamson to Bigelow Brothers and Walker; but still Anthony considers himself liable under the covenants of warranty contained in the Bodkin deed, and is carrying out his contract to furnish evidence to prove the titles of the defendants in error to

the *locus in quo*. Unless he can induce this court to obliterate and destroy the plats and field notes of over fifty years ago, to overrule and set aside the ruling of the Commissioner of the Land Department, affirmed by the Secretary of the Interior, we fear he will never be able to perform his contract. The United States government has disclaimed any title to the *locus in quo* in favor of the riparian owners, and will never reconsider such decision either through its Land Department or through its courts; for to do so would be contrary to the rulings of this court from *Hardin* v. *Jordan to Whittaker* v. *McBride,* decided by Justice Brewer in April, 1905. Any such attempt would be calculated, as stated by Mr. Justice Bradley in *Hardin* v. *Jordan,* to render titles uncertain, and to derogate from the value of natural boundaries like streams and bodies of water, and be grossly inequitable as against the rights of the riparian owner, plaintiff in error in this case.

BRIEF.

AS TO FEDERAL QUESTION.

If the Supreme Court of Arkansas had held that, as a matter of local law affecting riparian rights in general, the plaintiff in error could have no title to the bed of this lake, even conceding the official surveys of the United States Government to have correctly shown it to have been a permanent body of water, then no Federal question would have been presented by such ruling. But no question of local law was raised in this case, and the claims of the plaintiff in error were not denied by the defendants in error nor by the court on the ground of any such local law, those claims being thus conceded in so far as they related to the law of Arkansas governing riparian rights.

The substance of the claims of the defendants in error as shown and put in issue by the pleadings and the substance of the ruling of the Chancery Court of Poinsett County, Arkansas, and of the ruling of the Supreme Court of Arkansas as shown by the record and the opinion of the Supreme Court, is, conceding that the local law of Arkansas does not preclude, but sustains, the ownership of the beds of unnavigable lakes by riparian owners, that as a matter of fact, there never existed any lake in this instance, notwithstanding the contrary showing of the official records of surveys in the Land Department of the United States, under and by reason of which the plaintiff in error claims title to the *locus in quo*.

A Federal question is thus presented by the record in this case because:

The plaintiff in error has a complete record title to the *locus in quo*, and that record title is as follows:

1st. The official plats and field notes of surveys on

file and of record in the General Land Office of the United States.

2nd. The patents, without reservation, from the United States to the State of Arkansas of fractional sections and parts of sections abutting on the lake or permanent body of water which, as shown on said plats and by the field notes of said surveys covered the *locus in quo*, which patents expressly recite that the grants therein made are "according to the official plats of survey of said land returned to the General Land Officer, by the Surveyor General," whereby said official plats of survey are made parts of the patents, descriptive of the property and rights intended to be conveyed and must be read into the grants therein contained; which patents also contain habendum clauses in the following form: "together with all the rights, privileges, immunities and appurtenances thereto belonging."

3rd. The patents, without reservation, by the State of Arkansas of said fractional sections and parts of sections abutting on said body of water, carrying with them all rights and appurtenances, including riparian rights as reserved by the state from the United States, and mesne conveyances without reservation to plaintiff in error.

Towell v. *Etter*, 69 Ark., 34;
Crill v. *Hudson*, 71 Ark., 390.

That the grantees of the United States take the beds of non-navigable lakes and ponds around which lands granted by the Government are meandered on the official plats of surveys was settled by this court in the case of *Hardin* v. *Jordan*, 140 U. S., 371, 35 L. Ed., 428, cited in the letter of the Secretary of the Interior of November 17, 1902 (see *ante*, p. 15); which case has established the rule consistently adhered to by this court, and which the Land Department recognizes as controll-

ing its action in connection with all such grants, as is fully shown by reference to the Secretary's letter above mentioned.

The rule by which the grantee of the State of Arkansas acquires the same riparian rights which the State acquired from the United States is the common law rule by which the beds of non-navigable bodies of water belong to the owner of the abutting lands and pass with them to his grantee; which rule exists in the State of Arkansas and has not been denied or questioned in this case.

Warren v. *Chambers,* 25 Ark., 120, loc. cit., p. 122;

Harrison v. *Fite,* 148 Fed. Rep. (Adv. Sheets No. 7), p. 781 (U. S. Circuit Court of Appeals, 8th Circuit.

Taylor v. *Armstrong,* 24 Ark., 102, loc cit., p. 106;

Packet Co. v. *Sorrels,* 50 Ark., loc. cit., p. 472.

"If the State of Indiana got a title, it gave one." Mr. Justice Holmes, in *Kean* v. *Calumet Canal & I. Co.,* 190 U. S., 452, loc. cit., 461, 47 L. Ed., 1134, loc. cit., 1137. Which statement of the law applies with equal force to the State of Arkansas.

Upon the face of the record, therefore, the title of the plaintiff in error to the *locus in quo,* beginning with the recorded plats of survey in the Land Office, is complete.

The decree of the Supreme Court of Arkansas against the title claimed by plaintiff in error, based on a misconstruction of the recorded surveys under which the plaintiff in error claims title, or based on an unwarranted finding of fact from incompetent, irrelevant and immaterial evidence bearing on the correctness of those surveys, or based on both such grounds, against the contention of the plaintiff in error and against the official

findings of the Secretary of the Interior, plainly presents a Federal question; because, it touches the title of the plaintiff in error to the land in controversy, at the point where that title emanated from the United States, calls in question the authority given by law to the Secretary of the Interior to determine what land is of the character embraced within the terms of the Swamp Land Grant, and seeks to deprive the grants contained in the patents from the government of the scope and effect which they derive from the official surveys recorded in the Land Department by challenging the correctness of those surveys and also attempting to construe them against the title claimed thereunder; which surveys and the plats and field notes thereof are, as a matter of law, conclusive against all incompetent, irrelevant and immaterial oral evidence of the character offered in this case for the purpose of impeaching them.

Such a final judgment or decree in the highest court of the State of Arkansas, in which a decision in the suit could be had, manifestly brings this case within the jurisdiction of this court on a writ of error, because there is drawn in question the validity of an authority exercised under the United States and the decision is against such validity, and because such judgment or decree is against a title, right, privilege and immunity especially set up and claimed by plaintiff in error under a statute of, and commission held and authority exercised under the United States.

Lytle v. *Arkansas,* 63 U. S., 193, 16 L. Ed., 306;

French-Glenn Live Stock Co. v. *Springer,* 185 U. S., 47, 46 L. Ed., 800;

French v. *Fyan,* 93 U. S., 169, 23 L. Ed., 812;

De Cambra v. *Rogers,* 189 U. S., 119, 47 L. Ed., 734 (and cases cited);

Shively v. *Bowlby,* 152 U. S., p. 1, 38 L. Ed., 331;

Dower v. *Richards,* 151 U. S., 658, 38 L. Ed., 305;

First National Bank of Xenia v. *Stewart,* 114 U. S., 224, 29 L. Ed., 101;

U. S. v. *Ross,* 92 U. S., 281, 23 L. Ed., 707;

Thompson v. *Bowie,* 4 Wall., 463, 18 L. Ed., 423.

Conners v. *Meservey,* 76 Iowa, 691;

U. S. v. *Low,* 16 Pet., 162, 10 L. Ed., 923;

Kirby v. *Lewis,* 39 Fed. Rep., 66.

In *Lytle* v. *Arkansas, supra,* on a writ of error from this court to the Supreme Court of Arkansas, it was held that:

> "Under the 25th section of the Judiciary Act it is not material whether the invalidity of a title was decreed in the State court upon a question of fact or law. The fact that the title was rejected in that court authorizes this court to re-examine the decee."

And Mr. Justice Catron, in the opinion of the court, further says:

> The decision of the Supreme Court of Arkansas drew in question an authority exercised under the United States, to-wit: that of admitting Cloyes to make his entry; and the decision is against that validity, and overthrew his title, and is, therefore, subject to be re-examined and reversed or affirmed in this court, on all the pleadings and proofs which immediately respect the question of the proper exercise of authority by the officers administering the sale of the public lands of the United States.

In *French-Glenn Live Stock Co.* v. *Springer, supra,* on a writ of error from this court to the Supreme Court of Oregon, it was held that:

> "A Federal question is presented by a contention in the State Courts and in the Supreme Court of the United States, in an action to recover pos-

session of a tract of land patented to the State of Oregon under the Swamp Land Grant, that a proper construction of the survey and patents gives riparian rights covering the land in dispute, and that it is not competent to overcome such rights by evidence affecting the legal import of the plats and patents."

In *Shively* v. *Bowlby, supra,* on a writ of error from this court to the Supreme Court of Oregon, it was held that:

"A state judgment that the grant from the United States passed no title or right, as against the subsequent deeds from the state, in lands below high water mark, is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of this court."

In *First National Bank of Xenia* v. *Stewart, supra,* this court said:

"The law requires an open and visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences."

And the court cites *U. S.* v. *Ross, supra,* and *Thompson* v. *Bowie, supra,* to the same effect.

In *Dower* v. *Richards, supra,* on a writ of error from this court to the Supreme Court of California, it was held that:

"When the question decided by the State Court is not merely the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court."

In *Conners* v. *Meservey, supra,* the Supreme Court of Iowa, where an attempt had been made to prove that the land in controversy was not swamp land at the date

of the Swamp Land Grant by testimony as to its condition at the date of the trial, held that;

> "An objection that the proposed evidence was immaterial was properly sustained, for the reason that the question as asked related to the time when the witness was examined. It was immaterial what the character of the land then was. The material question was, what was its character on the twenty-eighth day of September, 1850?"

In *De Cambra* v. *Rogers, supra,* on a writ of error from this court to the Supreme Court of California, this court said:

> "But it is well settled that the decision of the Land Department upon questions of fact is conclusive on the courts." (Citing cases.) "It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided or as to the methods by which he reached his determination."

In *United States* v. *Low, supra,* this court said:

> "The official return of the Surveyor General has accorded to it the force of a deposition. So we held in the case of *United States* v. *Beward,* 16 Pet., 143, and *United States* v. *Hanson,* 16 Pet., 196, to which we refer."

We deem that enough has been said under this head to indicate the Federal nature of the questions involved, which also will fully appear from the general discussion of the case to follow.

POINTS AND AUTHORITIES ON THE MERITS.

I.

The *locus in quo* has never been selected by the state of Arkansas as land accruing to it under the Swamp Land Grant of September 28th, 1850, has never been held by the Secretary of the Interior to be land of that character, but has been held by him not to be of that character, and it passed to the state from the United States only by virtue of the riparian rights incident to the grant of the abutting lands.

If the *locus in quo,* which is definitely outlined by the official surveys of the abutting lands, was as is shown by those surveys, at the date of the surveys in fact a permanent body of water or lake, then the title of the United States to the bed thereof was, so far as its subsequent conveyance thereof was concerned, according to the local law, that of a riparian owner, and thereafter, no matter whether the lake filled up or dried up, the *locus in quo* passed with every succeeding grant of the abutting fractional sections or parts of sections, as held by the Supreme Court of Arkansas in *Towell* v. *Etter,* 69 Ark., 34, and *Crill* v. *Hudson,* 71 Ark., 390. See also *Harrison* v. *Fite,* 148 Fed. Rep. (Adv. Sheets No. 7), p. 781, and *Hardin* v. *Shedd,* 190 U. S., 508, 47 L. Ed., 1156.

At the time the plaintiff in error acquired by purchase in 1899 and 1900 (See Transcript, pp. 53 to 72), the lands abutting on this lake, they were shown by the official surveys which had remained unquestioned by the state and all others for fifty years, to be riprarian lands, and this court had, in *Hardin* v. *Jordan* (140 U. S., 371), settled the rule under which plaintiff in error acquired the ownership of the lake bed. The plaintiff in error is seeking to have its title thus acquired in good faith protected, contending that such surveys should be

and are, conclusive against adverse claimants pretending to hold the title thereto under a genral donating act of the state legislature which had no reference to these lands.

II.

Meander lines along or near the margin of a stream or other body of water are run to ascertain the quantity of public land sold, and are not boundary lines; *the waters themselves constitute the real boundary.*

Railroad v. *Schurmeir,* 7 Wall., 272, 19 L. Ed., 74.

By the common law, fresh water lakes and ponds, except the great navigable lakes, belong to the owners of the soil adjacent, who own the soil *usque ad filium aquae.*

A patent for government land whose boundary is described by a meander line along a small inland lake conveys strips and tongues of land which project into the water beyond the meander line.

Where the official plat of government land shows the general form of the lake and the surrounding fractional lots adjoining and bordering on the same, and the patents issued refer to this plat for identification of the lots conveyed, the lots extend to and are bounded by the lake; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow.

Hardin v. *Jordan,* 140 U. S., 371; Lawy. Ed., Vol. 35, p. 428;

Mitchell v. *Smale,* 140 U. S., 406; Lawy. Ed., Vol. 35, p. 442 *et seq.;*

Whittaker v. *McBride,* 197 U. S., 510; 49 L. Ed., 859;

Gould on Waters (Ed. 1900), Sec. 196, p. 379;

Note to *Willow River Club* v. *Wade,* L. R. A., Vol. 42, p. 305;

Grand Rapids & Indiana R. Co. v. *Butler,* 159 U. S., 87; 40 L. Ed., 85;

Harrison v. *Fite,* U. S. Circuit Court of Appeals, 148 Federal Rep., p. 781.

III.

Plats and field notes are the best evidence, and, in fact are now the only available evidence of the condition of *locus in quo* at the dates of the surveys from 1840 to 1849 and the date of the Swamp Land Grant, September 28, 1850.

Opinion of Judge Caldwell in *Kirby* v. *Lewis*, 39 Fed., p. 66.

Whittaker v. *McBride, supra.*

Judge Caldwell, in the above cited case, uses the following language:

"The value of field notes as evidence was settled by the Supreme Court of the United States in the case of *United States* v. *Low,* 16 Pet., 166, where the court says: 'The official return of the surveyor general has accorded to it the force of a deposition. So we held in the case of *United States* v. *Breward,* 16 Pet., 147, and *United States* v. *Hanson,* 16 Pet., 196, to which we refer.'

"They rank as the deposition of a surveyor charged under oath with the duty of noting on the spot, and at the time he makes the survey, the quality of the land."

He further says: "The following is a part of the preamble of an act of the legislature (of Arkansas) approved March 17, 1885:

" 'Whereas, more than thirty-four years have now elapsed since such date (28th September, 1850,) and but few persons are now alive who can testify to the character of such land as it appeared on the 28th day of September, 1850.'

"This is a legislative recognition of the difficulty of finding living witnesses to testify intelligently on this subject. The testimony must relate to the condition of the land at the date of the grant."

In *Hendry* v. *Willis,* 33 Ark., 833, where the defendants had undertaken to prove that the premises in controversy were not in fact swamp or overflowed land

within the terms of the act of September 28, 1850, the Supreme Court of Arkansas said:

> The proof refers to the time of trial, nearly thirty years after the act. From divers natural and artificial causes, the surface of the earth is continually changing, and lands which were wet, overflowed and unfit for cultivation in 1850, may be now high and arable; and so *vice versa*. Loc. cit., 837.

The testimony offered by the defendants in error for the purpose of discrediting the official returns of the surveyors amounted to no evidence. No witness having knowledge of any facts even nearly contemporaneous with the surveys was produced by the defendants in error. There was nothing in any of this testimony inconsistent with the existence of conditions in 1850 precisely as shown by the plats and field notes of the surveys. As was said by this court in *Hardin* v. *Jordan, supra,* "There should be some extraordinary proof of mistake on the part of the surveyor in order to interfere with the passing of the land as riparian land."

It is not to be assumed on the strength of such testimony as was offered in this case that the two surveyors, Johnson and Garretson, failed to survey so much land where their returns showed water, which land, if it existed, they could not have failed to see at some one of the numerous times when they were separately in the field between October, 1840, and May 30th, 1849. They evidently performed their duties with conscientious care. One of the evidences of this fact is the field note of Garretson dated May 30th, 1849, explaining with great explicitness why he did not run lines and meanders from corners on the short boundaries which had been run by previous surveys. The more these surveys are studied the more convincing they are that the water shown by them was of a permanent character. In October, 1840, Samuel

Johnson was prevented for a distance of nearly four miles from running any boundary line between townships 12-6 and 12-7 by the same body of water which Garretson found in December, 1848. Even if, as the witness Anthony testified, sloughs are now to be found along some of the meander lines, their presence there at this time, or in 1876, proves nothing as to conditions existing from 1840 to 1850. If surmises are to be permitted, it is more reasonable to conjecture that this lake at some points was deepest around its edges and that the recession of its waters left sloughs along the meander lines, than to conjecture that there was really no lake there and that there existed land which should have been surveyed where the return of the surveyors showed one expanse of water extending to the meander line.

Likewise there is nothing to connect the presence at this time of an alleged "ore-like substance" lying loosely upon the surface of the ground with conditions existing fifty years ago. There is nothing to show that this "ore-like substance" existed there at that remote period and assuming that it did so exist and that conjectures are permissible with regard to it, as reasonable a guess as any is that it lay on the bottom of this lake and has been uncovered by the recession of its waters.

All such evidence comes within that class declared by this court to be irrelevant, because there is "no open and visible connection between the principal and evidentiary facts and the deductions from them" and the law "does not permit a decision to be made on remote inferences," (*First National Bank of Xenia* v. *Stewart,* 114 U. S., 224); and as a matter of law, the objections of the plaintiff in error on the ground of its incompetency, irrelevancy and immateriality for the purpose of defeating the title claimed by the plaintiff in error under the surveys of the Land Department and patents from the United States, should have been sustained.

IV.

Decision of the Secretary of the Interior, based on plats, field notes and other records, is final on question of whether the fractional sections owned by plaintiff in error were properly meandered on a permanent body of water and on the question of whether or not the region shown as water on the United States government plats has ever been selected and approved to the State of Arkansas as swamp land under Swamp Land Grant.

Smith v. *Hollis,* 46 Ark., 17;
Hendry v. *Willis,* 33 Ark., 833;
Williamson v. *Baugh,* 71 Ark., 491.

In the last above cited case the Supreme Court of Arkansas cites the following cases:

Chandler v. *Calumet, etc., Co.,* 149 U. S., 79; 37 L. Ed., 657;
McCormick v. *Hayes,* 159 U. S., 332; 40 L. Ed., 171;
Rogers Locomotive Works v. *Emigrant Co.,* 164 U. S., 559; 41 L. Ed., 552.

To the same effect will be found:

Peyton v. *Desmond,* 129 Fed., 1;
DeCambra v. *Rogers,* 189 U. S., 120; 47 Law Ed., 734.

V.

Nothing can pass to the state as swamp land until identified as such by the Secretary of the Interior, the officer charged with that duty by the Swamp Land Act itself.

Mich. Land & Lumber Co. v. *Rust,* 168 U. S. p. 589; Vol. 42; L. Ed., p. 591.

VI.

Parol evidence as to condition of *locus in quo* at date of Swamp Land Grant is inadmissible unless Sec-

retary of the Interior has failed or refused to pass on that question; and in case at bar he not only has not failed or refused, but has finally passed on the question in regard to the identical lands in controversy. This unsurveyed region was manifestly not included as swamp land in the selections, approvals and patents, and the Secretary of the Interior has officially declared that it was not so included because it was not swamp land.

Williamson v. *Baugh*, 71 Ark., 491;
McCormick v. *Hayes*, 159 U. S., 332; 40 L. Ed., 171;
Chandler v. *Calumet, etc., Co.*, 149 U. S., 79; 37 L. Ed., 657.

"Parol evidence is inadmissible to show, in opposition to the concurrent action of Federal and state officers having authority in the premises, that certain lands were in fact, at the date of the Swamp Land Grant of 1850, swamp and overflowed land."

Syllabus in *McCormick* v. *Hayes, supra.*

In *Chandler* v. *Calumet, etc., Co., supra,* 36 Fed. Rep., 665 (affirmed in 149 U. S., 79), it was held (syllabus by the court) that "Under the provisions of the act of Congress of September 28, 1850, conferring swamp lands, and the Michigan act of June 28, 1851, evidence *in pais* that a parcel of land was, at the date of the first named act, of the quality therein described, is incompetent after the Secretary of the Interior has discharged his duty, and approved lists of swamp lands made under his directions from the field notes of survey, which lists do not contain the land in question, although embracing other lands in the township in which it lies, and where no judicial or other proceedings have been had to modify his action, or to extend or renew his powers over lands not so approved. In such case the state cannot claim that lands not so approved passed to it under the language of the act of Congress."

In *Williamson* v. *Baugh, supra,* the Supreme Court of Arkansas says, in regard to the decisions of the United States Supreme Court:

"These decisions hold that as the swamp and overflowed land granted to the state was, under the act, to be selected by the Secretary of the Interior, his decision in reference to the character of such land is, in the absence of fraud, final, and cannot be overturned by parol evidence in a collateral proceeding. Those cases seem to establish the rule that in action at law to recover such land by parties holding under the state parol evidence to establish the nature of the land can be resorted to only in cases where the secretary has failed or refused to act, and has made no decision as to the nature of the land."

VII.

The total region in controversy (so far as it is now or ever was covered by water) will be presumed to be a non-navigable body of water from meander lines of fractional sections owned by appellant to channel of St. Francis river, definitely located on Anthony plat.

Little Rock, M. R. & T. R. R. Co., v. *Brooks,* 39 Ark., 403; (see p. 408 of opinion);

Am. & Eng. Enc. of Law, Vol. 21, p. 429; Note 6 to Subdv. C;

Harrison v. *Fite,* 148 Fed. Rep., 781 (U. S. Circuit Court of Appeals, 8th Circuit).

Unlike the case of *Harrison* v. *Fite, supra,* involving the bed of Big Lake in Mississippi County, Arkansas, the title of the riparian owner to the lake bed is not in this case being contested by persons claiming the right to use the lake on the ground that it is navigable water. In the case at bar the basis of the claim of the defendants in error is the allegation that the *locus in quo* never was anything but land, contrary to the showing of the official survey. Questions of navigability and non-navigability do not therefore enter into the consideration of this case.

If navigable, the recession of the water of the lake has left the title to the lake bed in the riparian owner; if non-navigable, as is the legal presumption, the title to the lake bed always was in the riparian owner. On this general subject the statement of the law by Judge Hook, while having no important bearing on the issues arising in this case, may well be quoted as being a compact and comprehensive statement of the American law. He says:

"Courts take judicial notice of the navigable character of our important rivers and inland lakes—those that are so within our common knowledge; but there are many of such insignificant capacity and doubtful utility that the question, being one of fact, is to be determined by the evidence produced, and in such case the burden of proof rests upon him who asserts the existence of the public servitude."

VIII.

The common law governing riparian ownership prevails in Arkansas; and the rule that the owners of land abutting on a non-navigable lake or pond own the soil under the water fully prevails in this state.

Warren v. *Chambers,* 25 Ark., 120.
Harrison v. *Fite,* 148 Fed. Rep., p. 781;
Organ v. *Memphis* & *Little Rock R. R. Co.,* 51 Ark., p. 235;
Nix v. *Peiffer* (Ark), 83 S. W., 951;
Taylor v. *Armstrong,* 24 Ark., p. 102;
Packet Co. v. *Lowells,* 50 Ark., l. c., 471;
Reichert v. *St. Louis* & *S. F. R. Co.,* 51 Ark., 491.

"At common law the bed of a river belongs to the government so high up only as it is navigable in a technical sense, that is, as far as the tide ebbs and flows; and above that point it belongs to the riparian owners; each—where their lands lie on opposite sides of the river—owning to the middle of the stream."

From Opinion of the Court in *Warren* v. *Chambers, supra,* p. 122.

For able exposition and discussion of the common law as to riparian ownership see Judge Bradley's opinion in *Hardin* v. *Jordan,* 140 U. S., loc. cit., 389; Vol. 35, Lawyers' Ed., loc. cit., p. 435, *et seq.*

IX.

Where river runs through lake or bayou, the main channel will be the boundary in dividing up the bottom, in case of recession of the waters, among owners of fractional sections meandered on such lake or bayou.

Gould on Waters (Ed. 1900), Sec. 196, pp. 380, 381, and cases cited therein;

Felder v. *Bonnett* (South Carolina), 2 McMullen's Law, —; 37 Am. Decisions, 545;

Cessill v. *State,* 40 Ark., 501;

Harrison v. *Fite,* 148 Fed. Rep., 781.

Mr. Gould says: "Thus the term 'river,' when employed to designate a boundary by land owners whose title extends *usque ad filium aquae,* means in law the center of the stream, and *prima facie the center* of its main channel, where there is more than one," 379-380. * * * "Even a marsh, bayou, or swamp, may constitute a well defined boundary of a tract of land, and the thread of the channel or stream flowing through it, if any, may be regarded as the boundary line," p. 381.

X.

CASES CITED AS CONTRA DISTINGUISHED.

In all cases decided by the Supreme Court of the United States where meander lines, which evidence showed failed to go to actual water on which they purported to be meandered, were held boundaries of grant, the result was to leave the title in the United States, and in most of them the United States was asserting title to the land beyond the meander lines, by surveys prelimi-

nary to patents, or by the actual issuance of patents; while in the case at bar the United States has officially and expressly disclaimed any title to land beyond meander lines in favor of riparian owners, and repeatedly declined to make surveys.

The opinion of the Supreme Court of Arkansas, affirming the judgment of the Chancery Court of Poinsett County, bases its decision on the opinions of this court in *Horne* v. *Smith, Niles* v. *Cedar Point Club,* and *French-Glenn Live Stock Company* v. *Springer* under an evident misconception of the effect of those decisions, and overlooking the essential dissimilarity of the *admitted* and proved facts in those cases to the facts in the case at bar as established by official records and findings, which cannot be legally overthrown by wild conjectures and remote inferences from incompetent testimony based mostly on examinations of the *locus in quo* just recently made, over fifty years after the official surveys, or else founded on hazy recollections of random and desultory observations alleged to have been made twenty-five to thirty years after the time in question at the earliest, and generally far later.

In the three cases cited by Judge Battle, the additional facts considered in construing the official survey were either admitted or proved by explicit testimony of persons having knowledge of the *locus in quo* contemporaneous with the survey, while in the case at bar, the witness Anthony only claimed to have known the country since 1874, twenty-five years and more after the official surveys, and did not in fact survey it until 1900 (Transcript, 130 and 131). Witness Biggs had "just gone over it" hunting and trapping since 1888 (Tr., p. 118), and had assisted Anthony in his survey with witness Odom, who shows no prior knowledge of it (Tr., 126), while witnesses Peters and Davis had known the country first in the late eighties (Tr., 86 and 103), and had exam-

ined it in detail only since the Anthony survey. Witness Varner who had known the place since his early childhood in 1844, testified to the filling up only (Tr., 108), and had no further knowledge on the subject.

The testimony of all the witnesses is more or less indefinite, inexplicit, disconnected, and uncertain, including even that based upon the recent private survey and examinations, which evidence is naturally somewhat more detailed than the recollections from general observations of the country casually made at earlier dates without specific direction of attention to the *locus in quo* now in controversy.

From this testimony as to *present conditions* it is apparent that the surface of the *locus in quo is now* somewhat uneven, checked with sloughs, and bearing more or less vegetation and undergrowth and some moderate sized timber, apparently for the most part at least of such varieties as grow to some extent in shallow waters free from swift and continuous currents.

In fact, there is nothing in this testimony at all irreconcilable with the official records and findings showing the place to have been a permanent body of water or lake over fifty years before, when the various official surveys were made, as ample time has elapsed for the changes which have taken place in recession of the waters, filling up or growth of timber so far as the testimony shows. On no theory can the oral evidence be held to demonstrate an obvious error of the government surveyors or Land Department, as the law requires beyond question for the overthrow of official surveys, to say nothing of the findings of the Secretary of the Interior.

It is not a question of the weight of the evidence, but a case of simply no evidence contradicting the official records—a pure question of law, which the Arkansas court erroneously decided by treating such remote and uncertain testimony as if certain and contemporaneous,

and competent to base a finding thereon in opposition to official plats, field notes and surveys, and as if no ruling of the department to the contrary existed.

Now to differentiate the cases relied upon by our opponent as authority for the decision founded upon this evidence, to which we have objected as incompetent for such purpose from the first, it will be seen that neither this court nor others have received such evidence as supporting such a finding heretofore.

HORNE v. SMITH, 159 U. S., 40; 40 L. Ed., 68.

In this case owners of fractional sections meandered on "Indian River" by the survey sought to eject parties in possession of land beyond the meanders and between them and Indian river, as actually located. An examination of this case shows no dispute at all of the facts claimed by defendants, but on the contrary it seems to have been admitted, or at least proved by unquestioned evidence, that there was at the time of the survey as well as of the trial, such a body of land between the meander line and the river, as well as a distinct bayou or savannah on the meander line, and no question is raised as to the competency of the evidence establishing these facts, which apparently were not denied, but the plaintiff seems to have based his claim wholly upon the words "Indian river" on the plat, claiming that as his boundary. The court held the words "Indian river' in the survey to have been an error, and held the meander line or bayou to be the boundary, thus apparently leaving the title to the land beyond in the United States. No action by the Land Department appears in the case. This decision in no wise militates against the claimants of riprarian rights as pointed out by Mr. Justice Brewer in *Whitaker* v. *McBride*, 197 U. S., 510, 49 L. Ed., 859, distinguishing all of these cases.

NILES V. CEDAR POINT CLUB, 175 U. S., 301, 44 L. Ed., 171.

In this case a tract of land called by the surveyor "flag marsh," lay between Lake Erie and the northern meander line of claimant Niles' fractional sections, by virtue of which a riparian right to the marsh was claimed. The state of Ohio had, soon after the issuance of the patents for the land south of the "marsh," selected the marsh as swamp land, *which selection the secretary disapproved, marking it "not swamp land." The Land Department subsequently surveyed and issued patents to the tract* to homesteaders, from whom the Cedar Point Club claimed title. The case was tried on an *agreed statement of facts*, from which it appears that "at the time of the survey the waters of Lake Erie *were above their ordinary stage, and there was more than the usual volume of water standing upon the land in controversy* flowing from the "interior," while in the case at bar the surveyor's note urged against us, the only evidence on the subject, says the water was *"at a medium stage"* at the time of the survey.

Judge Brewer says the following in the Niles case: "It was called a marsh by Rice, the first surveyor, is so styled on the plat, and the *conditions as disclosed by the agreed statement indicate that it* was a body of low, swampy land, partly boggy and partly dry, sometimes subject to inundations from Lake Erie or the overflow of adjacent streams, but *not permanently covered with water.*" It will be observed that in this case not only was no question raised as to the extraneous evidence, but that the ruling of the Land Department was precisely the opposite to its ruling in the case at bar. Under the wholly different conditions of this case as shown the fact that the court held the meander line of the marsh to be a boundary affords no precedent against our contentions herein.

FRENCH-GLENN LIVE STOCK CO. v. SPRINGER, 185 U. S., 47, 46 L. Ed., 800.

The plaintiff in this case claimed the bed of Malheur lake, because the government patent of 1877 or plat meandered their northern boundary on the lake, and offered evidence to show the existence of such lake on their boundary at the time of the survey. The title of the defendants in possession of the land does not appear, but they offered evidence to show that the lake was outside the side lines of the meander line in 1877, when the survey was made. There does not appear to have been any action by the Land Department affecting the controversy, and evidently the finding that said lake was not contiguous to plaintiff's boundaries at the time of the survey was supported by testimony based on contemporaneous knowledge of the conditions, as the survey was comparatively recent, and no question is raised as to the competency of the evidence offered. The effect of the finding against plaintiff was apparently to leave the title in the United States, but the case can have no application to the present controversy, where no such contemporaneous evidence was offered and the government has officially disclaimed title in favor of plaintiffs in error as riparian owners.

It will be observed that the Supreme Court of Arkansas does not mention *Whitaker* v. *McBride*, 197 U. S., 510, 49 L. Ed. 859, in citing the above cases. In the latter case the court upheld the action of the Land Department in favor of the riparian owner in refusing to survey an island of 22 acres in 1897, where the official survey of 1876 had omitted it, there being nothing to indicate mistake or fraud on the part of the surveyors, just as in the case at bar.

McDade v. Bossier Levee Board, (Sup. Ct. La.), 33 South. Rep., 628.

An examination of the case of *McDade* v. *Bossier Levee Board, supra,* will disclose that the court based its decision on the following grounds:

(1) All of Sections 11 and 12 and all of the south half of Section 2, in the township, had been approved and patented by the United States to the state of Louisiana. "Red Shoot Lake" was a long, narrow body of water that ran diagonally through Section 11, from the northwest to the southeast corners thereof, and cut off the southwest corners of Sections 2 and 12.

(2) These sections had been subdivided into quarters, fractional quarters and lots, some of which abutted on the lake.

(3) By an act of the Louisiana legislature of 1855, being, as the court stated, the very act under which McDade's grantors acquired title from the state to the abutting land, it had been declared that lakes of the character of "Red Shoot Lake" *"are required to be treated as land, and to be surveyed and sold as such."*

The court, therefore, held that, the sections having been granted to the state in their entirety and the legislature having, before the abutting land had been sold by the state, declared that this lake should be treated as land and surveyed and sold as such, the subsequent grant by the state of the lots and fractional parts of sections adjacent to this lake would not carry any part of the water covered area which the state had thus, by legislative enactment, expressly reserved.

We readily concede that either the United States or a state may reserve the beds of lakes or other bodies of water and this may be done either in the patents granting the abutting lands, or by legislation previous to the con-

veyance to private owners of the abutting lands; so that, if the State of Arkansas, after becoming the riparian proprietor of the lands around St. Francis lake, and while the state yet owned these lands together with the lake itself, had, by an act of the legislature, declared that the lake should be treated as land and as such reserved for future survey and sale, as was done in Louisiana, then this reservation would have been impliedly written into every grant of the abutting lands thereafter made by the state, and the grantees of such lands could not have acquired any interest in the lake or the bed of the lake, and could have acquired no riparian rights in connection therewith. But there never was any such reservation on the part of the State of Arkansas, either by legislative act or otherwise. The state must, therefore, be held to have parted with all of its interest in the lake bed when it patented the land bordering thereon, and its grantees must be held to have succeeded to all the riparian rights of the state. For "if the state (of Indiana) got a title, it gave one" to the lake bed when it conveyed the surrounding land, as was said by Mr. Justice Holmes in *Kean* v. *Calumet Canal & I. Co.*, 190 U. S., 452; loc. cit., 461; Vol. 47, Law Ed., p. 1134, loc. cit., 1137, reaffirming the decision of the court in *Hardin* v. *Jordan*, 140 U. S., 371; Law Ed., Vol. 35, p. 428.

XI.

In the case of non-navigable waters, a deed which describes land as bounded by the water conveys *prima facie* as far as the grantor owns. This rule applies to a grant from the Crown, a state or the United States, and applies as well to navigable as un-navigable fresh streams, where the soil of navigable fresh rivers is held to be private property. This is true in all grants in which no distinct reservation is made; and although both the United

States and the State of Arkansas might have made reservation in their patents, neither of them did so in fact.

Towell v. *Etter,* 69 Ark., 34;
Crill v. *Hudson,* 71 Ark., 390;
Gould on Waters (Ed. 1900), Secs. 195, 196, pp. 377-379, and cases cited;
Freeman et al., v. *Bellegarde,* 108 Calif., p. 179;
Hardin v. *Jordan,* 140 U. S., 371; L. Ed., Vol. 35, p. 436, loc. cit.

In *Hardin* v. *Jordan, supra,* Mr. Justice Bradley says:

"When land is bounded by a lake or pond, the water, equally as in the case of a river, is appurtenant to it; it constitutes one of the advantages of the situation and a material part of its value, and enters largely into the consideration for acquiring it. Hence the presumption is that a grant of land thus bounded is intended to include the contiguous land covered by water. Besides a lake or pond, like a river, is a concrete object, a unit, and when named as a boundary the natural inference is that the middle line of it is intended—that is, the line equidistant from the land on either side."

XII.

"Where a water line is the boundary of a named lot, that line remains the boundary, no matter how it shifts; and a deed describing the lot by number or name conveys the land up to that shifting line, exactly as it does upon the shifting side lines."

Towell v. *Etter,* 71 Ark., 34, p. 39, loc. cit.
Jeffries v. *East Omaha Land Co.,* 134 U. S., 178; L. Ed., Vol. 33, p. 872.

Therefore, the sale of "the northeast fractional quarter of Section 18, Township 8 South, Range 3 West, 10.88 acres," for delinquent taxes, was held to convey an accretion of 148.91 acres.

Crill v. *Hudson,* 71 Ark., 390.

XIII.

The defendants in error contend that the region in controversy was land, not water, at the time of the Swamp Land Grant. If this contention were true, the *locus in quo*, under all the cases that can be cited by defendants in error, belongs to the United States. The United States has, however, refused to make any survey thereof, and has disclaimed all rights in favor of riparian owners of fractional meandered sections. Therefore, on their own showing, as between the parties to this suit, plaintiff in error has title to the *locus in quo*.

Grand Rapids & Indiana R. Co. v. *Butler,* 159 U. S., 87; 40 L. Ed., 85.

Whitaker v. *McBride,* 197 U. S., 510; 49 L. Ed., 859.

In this, the most recent case involving the questions here discussed, the law as stated in the great leading case of *Hardin* v. *Jordan* is reaffirmed; and Mr. Justice Brewer, in delivering the opinion of the court, says in closing:

"Our conclusion, therefore, is that by the law of Nebraska, as interpreted by its highest court, the riparian proprietors are the owners of the bed of a stream to the center of the channel; that the government, as original proprietor, has the right to survey and sell any lands, including islands in a river or other body of water; that if it omits to survey an island in a stream, *and refuses, when its attention is called to the matter, to make a survey thereof,* no citizen can overrule the action of the Department, assume that the island ought to have been surveyed, and proceed to occupy it for the purposes of homestead or pre-emption entry. *In such a case the rights of riparian proprietors are to be preferred to the claims of the settler.*"

ARGUMENT.

1.

It is too self-evident to need argument that the Land Department of the United States is the highest authority on all questions as to what facts are indicated by certain lines, notations and other marks appearing on its plats and surveys, made under its directions, rules and regulations.

2.

The Land Department of the United States, after hearing and on application for ruling by the St. Francis Levee Board, has decided that "when, in the extension of the lines of public surveys, a lake is meandered, its area is segregated from the public domain; and beds of inland non-navigable meandered lakes, or lands uncovered by the recession of the waters of such lakes, from natural or artificial causes, since the survey and disposition of the adjacent shore lands, do not belong to the United States, *but to the riparian owners.*" Hence, the State of Arkansas took the fractional sections meandered by the plats and field notes on this water, with the water-covered land as an *appurtenance;* and when the state, in turn, patented such fractional sections to plaintiff's grantor, Beach, the appurtenance passed from the state to Beach exactly as it had passed from the United States to the state, not as swamp lands, but as an apputenant water right in favor of a riparian grantee.

3.

This lake, being a lake off the St. Francis river at this point, clearly the riparian grantees claiming under a United States patent, plat and field notes meandered along the sinuosities of this lake or bay, go to the St. Francis river main channel. the lake itself being entirely un navigable.

4.

Plaintiff in error and defendants in error claim under a common source of title—the State of Arkansas.

Plaintiff in error claims under a patent from the state, the unsurveyed, then water-covered land, up to the channel of the St. Francis river on the west passing as an *appurtenance* under the very language of the patent.

Defendants in error as "straw grantee" (the real grantee being James Anthony, who "found" these lands for the Levee Board, and contracted to furnish evidence to swear case against timber cutters on the lands through) has no title whatever, merely claiming under act of 1893 (passed years after the state had patented these lands to Beach, with their *appurtenances*) and merely giving, in general terms, land in St. Francis Levee District to Levee Board without description of specific lands.

5.

Call this water (held a "permanent body of water" by the U. S. Land Department), "a lake," "sunk land," or "the scatters," if you like, still it constituted a well-defined boundary in these patents, both from the United States and the State of Arkansas; the water was the real boundary, and the east bank or thread of the main channel of the St. Francis river flowing through the lake, is the true limit of the grant.

6.

"In case of non-tidal waters, a deed which describes the land as bounded by the water conveys *prima facie* as far as the grantor owns.

"This rule applies to a grant from the Crown, a state or the United States." Hence, swamp land patent passed all the state owned as riparian owner under U. S. patent, to its grantee, Beach. The State of Arkansas is estopped by its own grant.

7.

Ordinary fair dealing requires that the courts should protect a riparian owner who has purchased in good faith, relying upon United States patent, plat and field notes, and state patent made on such survey and plat, against claim of the real defendant, James Anthony, who found these lands and persuaded the Levee Board that they might claim them, and bought them from the Levee Board at 50 cents per acre, in Bodkin's name, and has had them deeded along from one apparent purchaser to another, who surveyed them at his own expense, and who has undertaken to furnish evidence to show that the Levee Board owned them.

8.

The common law prevails in Arkansas as to riparian ownership, and under it plaintiff in error's title by United States and state patents carries, as an appurtenance or incident to the main grant, the bed of this lake up to at least the east bank of the St. Francis river, and said river is definitely located by the complaint and answer in this case and the plat of the Anthony survey, filed in Poinsett county.

9.

Plaintiff in error bought these fractional sections, *meandered on the water*, and equity demands that they should be protected in their water rights as riparian owners, which passed to them as a most *important* appurtenance or incident right under the very terms of the patents through which their title is derived.

10.

Owning the bed of this lake to the east bank of the St. Francis river, which now is located so as to divide this lake north and south, of course the evident and

equitable line of division is such river, because it is to the river that we should equitably go as riparian owners on this water; the fractional sections on the west side going to the west bank of the river, and we, as riparian owners, to the east bank. If we should ever claim anything inside the bed of the St. Francis river it would have to be by accretions, but to the channel as located by appellees themselves we go as riparian owners from meanders around this *non-navigable* lake or bay through which this river runs.

Harrison v. *Fite,* 148 Fed. Rep., p. 781; Oct., 1906, U. S. Circuit Court of Appeals.

In the case of *Harrison* v. *Fite, supra,* the bed of Big Lake in Mississippi County, Arkansas, constituted the *locus in quo.* Big Lake lies about fifteen miles northeast of the lands in controversy in the case at bar. In many ways there is much similarity between the basin of Big Lake and that of the lake which is involved in this case, particularly with reference to the rivers, the channels of which run through each of these lakes. As stated by the court in that case, "Little river has a well *defined* bed, largely free from vegetation and obstruction, running along the western margin of Big Lake basin." In like manner the St. Francis river, about the location of which there is no controversy in this case, runs from north to south through the western part of the lake basin and its channel or bed is conceded by both parties to be definitely located on the Anthony plat. The court in *Harrison* v. *Fite* found that Little river was not navigable and that the owners of the surveyed lands abutting on the government meander line around Big Lake owned by virtue of their riparian rights to the middle thread of Little river, that being the dividing line between the land on the east and that on the west of Big Lake. In the case at bar riparian owners on the east and west sides of

the lake own to the banks on the east and west sides of the St. Francis river if it is a navigable stream, or to the middle thread thereof if it is non-navigable. Hence, the plaintiff in error owns the entire *locus in quo* lying east of the east bank of the St. Francis river as that river is located on the Anthony plat.

11.

It is the duty and privilege of this court to examine public reports, plats, field notes and other documents in the United States Land Office, relating to the swamp land grants to the State of Arkansas, and this practice has the sanction of the United States courts.

See Judge Caldwell's opinion in *Kirby* v. *Lewis*, 39 Fed., p. 66; loc. cit., p. 77.

Also *Knight* v. *United Land Co.*, 142 U. S., p. 161; L. Ed., Vol. 35, p. 974.

12.

Plaintiff in error and defendants in error claim under a common source of title, the State of Arkansas. Plaintiff in error contends that unsurveyed land in controversy did *not* pass to State of Arkansas *under* Swamp Land Grant, because never selected, approved or patented, but *did* pass as an appurtenance to such patent, under surveys, plats and field notes, and under the decision of the Secretary of the Interior that it was at date of grant a *permanent body* of water, upon which plaintiff in error's patented fractional sections were properly meandered.

This difference between plaintiff in error and defendant in error is a *vital* one, *because,* if it passed to the state as such appurtenance in favor of state as *then* riparian owner of the surveyed fractional sections *then* owned by the state, such unsurveyed lands, of course, passed on to plaintiff in error under state patent and subsequent *mesne* conveyances.

13.

The unsurveyed land in controversy, being at the date of Swamp Land Grant the bottom of a permanent body of water, passed to the State of Arkansas as a riparian owner, and even if the lake had receded and partly dried up in 1871, when state made patent to Beach, such accretions passed even though formed between 1856-8, date of United States patents, and 1871, date of state patent, under the decision of the Supreme Court of Arkansas in *Towell* v. *Etter,* 69 Ark., p. 34, and also *Crill* v. *Hudson,* 71 Ark., p. 390, to say nothing of the presumption that grantor, in absence of reservations, conveys all he owns.

According to our view of this case, the ownership of the bed of this non-navigable lake by the owners of the land abutting thereon dispenses with all questions of accretion or reliction. The law of accretions and reliction has little or no application to the right of riparian ownership of lands meandered on non-navigable waters, as riparian proprietors own the bottom, wet or dry. By all the evidence that we have, or can have, there existed at the time of the Swamp Land Grant this body of water on which the fractional sections in Township 12, in Ranges 6 and 7 abutted, which body of water had all the characteristics of a permanent non-navigable lake, and was so treated in the official surveys made at that time. As, under the common law of riparian ownership, which is in force in Arkansas, the abutting land owners had the title to the bottom of this lake, and this title has passed with every successive grant of the abutting land, it is of little importance to inquire in this case whether or not dry land now exists where formerly there was water, or how such dry land was formed, if it does so exist. For this reason we have not undertaken to abstract the testimony of the witnesses, Peters, Davis, Varner, Biggs and Odom,

which relates to the present condition of *locus in quo* with reference to the character of the land and water within its limits. There is evidence, however, in this testimony to show that this lake has been gradually filling up, and this fact is distinctly admitted in the correspondence of the St. Francis Levee Board, through its chief engineer, with the Land Department. (See opinion and finding of Secretary of Interior at middle of page 112, transcript.) In his letter to the Secretary of the Interior of June 25, 1894, the chief engineer of the St. Francis Levee District said:

"The numerous overflows since then have filled up these lakes and swamps very much and changed largely the general features of the country. To such an extent has this filling up been done that the areas and depths of these lakes and swamps have been very much reduced and around their margins forests of large timber now stand on space then occupied by water."

This court will take judicial cognizance of the way in which these lakes in Arkansas fill up and dry up, that is, gradually and imperceptibly, and no evidence is procurable that would carry us back to 1850. As stated by Judge Caldwell in *Kirby* v. *Lewis*, already cited, the difficulty of finding living witnesses as to conditions in 1850 was recognized by the legislature of Arkansas twenty years ago, in the act of March 17, 1885, the preamble of which contains the language already quoted, viz.: "Whereas, more than thirty-four years have now elapsed since such date (28th September, 1850,) and but few persons are now alive who can testify to the character of such land as it appeared on the 28th day of September, 1850."

Also article of Thomas M. Cooley, 13 Central Law Journal, p. 1; and Comments and Discussion thereon, 32 Central Law Journal, p. 291.

14.

An examination of both the patent for 12-6 and 12-7 will show that the words "Township 12 North, Range 6 East" are used as a caption or statement of the township and range containing the lands thereafter to be specifically described. This was evidently a form used and in most cases the caption would be followed by description of sections and fractional sections, but in this case, the conveyance not being by sections, the description is exactly as follows:

"Township 12 North, Range 6 East."

"The whole of fractional township, containing seven thousand two hundred and thirty-six acres, and seventy-eight hundredths of an acre, *according to the Official Plats of Survey of the said land returned to the General Land Office, by the Surveyor General.*"

The United States expressly conveyed only a fractional township made fractional by certain meander lines, which defendants in error contend were run as boundaries for the purpose of limiting the grant. How then, can they consistently claim any land beyond these boundaries?

In the case of Township 12 North, Range 7, the patent to the state described the land as follows:

"Township 12 North, Range 7 East."

"The whole of the Township except section Sixteen; containing thirteen thousand eight hundred and fifteen acres and sixty-seven hundredths of an acre, *according to the Official plats of survey of the said lands returned to the General Land Office by the Surveyor General.*"

Section sixteen was a surveyed fractional section; in Township 12-6 there was no Section sixteen, hence on exception.

The meander line along the west side of fractional sections 6, 7, 18 and 19, Township 12 N., Range 7 East, as shown on the township plat, is the western limit or

boundary of the surveyed and platted township. It is the only line shown on the plat as the west boundary and all outside of that boundary must be outside of the township. The appellees, therefore, gain nothing by claiming that the whole township was patented to the state by the United States, especially while contending that the meander line is a boundary: for nothing west of this exterior boundary could pass to the state *as a part of the surveyed township*. But this did not prevent riparian rights, extending beyond the township, from passing with the land granted within the surveyed township. In other words, the meander line in this instance is the west boundary of the surveyed and platted township, because no other western limit is given on the plat. Yet this meander line was not the boundary *of the grant*, which, by reason of its riparian character, extended beyond the surveyed township, just as the conveyance of a fractional section or fractional part of a section will, in like manner, where the land is of a riparian character, carry also the land beyond the meander line. *Towell* v. *Etter*, 69 Ark., 34; *Crill* v. *Hudson*, 71 Ark., 390. So far as concerned, *the grant itself*, the meander line was intended not as a boundary, but merely for the purpose of showing the sinuosity of the water.

The defendants in error in seeking to hem in *the grant* behind the meander lines by declaring in their answer that they were run as boundaries, evidently had in mind the case of *Horne* v. *Smith*, where there was no question of the riparian ownership of a lake or river bed.

The case at bar is easily distinguished as before shown from *Horne* v. *Smith*. But if the facts were such as to make the ruling in *Horne* v. *Smith* applicable, this in itself would leave the defendants in error strangers to the title, a result, which as before stated, they appear to have overlooked in contending that the meander lines

were the boundaries of the grant. If they bounded the grant from the state they must also have bounded the grant from the United States to the state. The Secretary of the Interior, however, has officially found upon full investigation, such a state of facts in connection with the *locus in quo* as to make the rule declared in *Hardin* v. *Jordan* applicable, leaving the title in the riparian owner. Neither the defendants in error, nor any one under whom they profess to claim, were necessary parties to any proceeding in the Land Department wherein this finding was made, if for no other reason than that by their own showing they can have no title to or interest in the land in controversy. The matter affected only the United States and the right of the riparian owner and was settled in favor of the latter on a question of fact arising within the jurisdiction of the Secretary of the Interior and in his department, as bearing on and regulating his official action, of which question of fact he was the final arbiter. There is no one who has the right to question this action of the Land Department, and this is especially true as to one who advances claims and bases them on contentions which, if correct, would in themselves debar him from any right or title to the land in controversy; and this statement, as applied to the claims of the defendants in error, gathers additional force when we consider the equities of the case, in view of the fact that at the time the plaintiff in error purchased these lands, in 1899, the St. Francis Levee District was on record in the Land Department as not claiming them, and the Land Department, on an application by the St. Francis Levee District to have the lands donated by the general government to the state or to the Levee District, had officially held the title to be in the riparian owner, and all the acts of the United States, the state and the St. Francis Levee District had conceded the riparian character of these lands and confirmed the ownership thereof in the riparian

owner. The idea that some profit was to be made by the pretense that these lands passed to the Levee District under the General Donation act of the state legislature in 1893, was first conceived and the lands "found" by the witness, Anthony, for speculative purposes, after the plaintiff in error had bought, in good faith, the abutting lands, and is the basis of the claim now made by the defendants in error. The rights of the riparian owner are certainly to be preferred to such a claimant. The language of this court on *Whitaker* v *McBride,* already quoted, seems particularly applicable to such a case, viz.: "That if it (the government) omits to survey an island in a stream, and refuses when its attention is called to the matter to make a survey thereof, no citizen can overrule the action of the department, assume that the island ought to have been surveyed and proceed to occupy it for purposes of homestead or pre-emption entry. *In such a case the rights of riparian proprietors are to be preferred to the claims of the settler,"* and it might be added that such rights are to be preferred to the claims of the speculator. The basis of the title of the plaintiff in error to the land in controversy, as before stated, is, however, not that the state never acquired the title thereto as would appear from defendants in error's own contention, but as determined by the Secretary under the facts found by him, that the state did acquire them by the law of riparian rights, with the lands abutting on the lake which, when they belonged to the United States, covered the *locus in quo,* and that by the same law the state conveyed the lands in controversy, whether then water covered or not when it conveyed without reservation the abutting lands to the parties under whom the plaintiff in error claims.

IN CONCLUSION.

We have not attempted to cite in this brief the numberless cases from the Supreme Court of the United States and the Supreme Courts of the various states on the questions involved in this case. Plaintiff in error, as owners under the United States and state patents of fractional sections meandered on this unsurveyed region, which was water at the time of the Swamp Land Grant, and which surround the *locus in quo* on the north, east and south, claim that their grant takes them to the channel of the St. Francis river as located on the Anthony plat, under the decision of the Secretary of the Interior, November 17, 1902, recognized as final by the Supreme Court of Arkansas in the recent case of *Williamson* v. *Baugh*, 71 Ark., 491; 76 S. W. Rep., 423; and under the authority of the case of *Hardin* v. *Jordan*, cited above, immediately followed by the case of *Mitchell* v. *Smale*, also cited above, and consistently followed by a large number of decisions of the Supreme Court of the United States, down to Mr. Justice Brewer's opinion, rendered April 10, 1905, in the case of *Whitaker* v. *McBride*, also cited above. Cases which will be relied upon *contra*, and of which *Horne* v. *Smith*, cited above, is the leading example, although easily distinguished, even if followed by this court, would result in finding that the United Statets still holds title to the *locus in quo*. As between the parties to this controversy, which is a suit in equity, all of the equities are in favor of plaintiff in error, who purchased the surveyed and patented fractional sections, meandered on the region of water at the time of the Swamp Land Grant, in reliance upon its riparian rights at common law, which is the law of Arkansas, so far as the Supreme Court has passed upon that question, to go to the St. Francis river, whose channel is definitely located by the Anthony survey, for the purposes of this case.

Defendants in error, without any equities, and chargeable with laches since 1893, when the St. Francis Levee Board under whom they claim was organized, and after having sought and failed to induce the United States to survey and patent this land to third parties, in order that it might be put upon the tax books, were, at the eleventh hour, induced by Anthony to claim it themselves, and to deed their claims to that enterprising engineer through the "straw" grantee Bodkin at 50 cents per acre. On no theory of this case can the *locus in quo* belong to defendants in error. On the strength of the facts and authorities hereinbefore cited, it belongs to plaintiff in error; and even on admissions in pleadings, position of defendants in error's counsel, and authorities relied upon by him, it would still be the property of the United States, which has already disclaimed title in favor of the riparian owners.

We cannot refrain from quoting in closing, the language of Mr. Justice Bradley in *Mitchel* v. *Smale, supra*:

"Our general views with regard to the effect of patents granted for lands around the margin of a non-navigable lake, and shown by the plat referred to therein to bind on the lake, were expressed in the preceding case of *Hardin* v. *Jordan,* and need not be repeated here. We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often *the* most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned. The pretense for making such surveys, arising from the fact that strips and tongues of land

are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow."

We submit that upon the official surveys and records, not only unimpeached by any competent testimony, but also officially and finally confirmed in plaintiff in error's favor by the Secretary of the Interior, and upon the law as repeatedly declared by this court, the decision of the Supreme Court of Arkansas should be reversed by this court and a decree ordered by it to be entered in accordance with the prayer of the complaint of the plaintiff in error.

Respectfully submitted,

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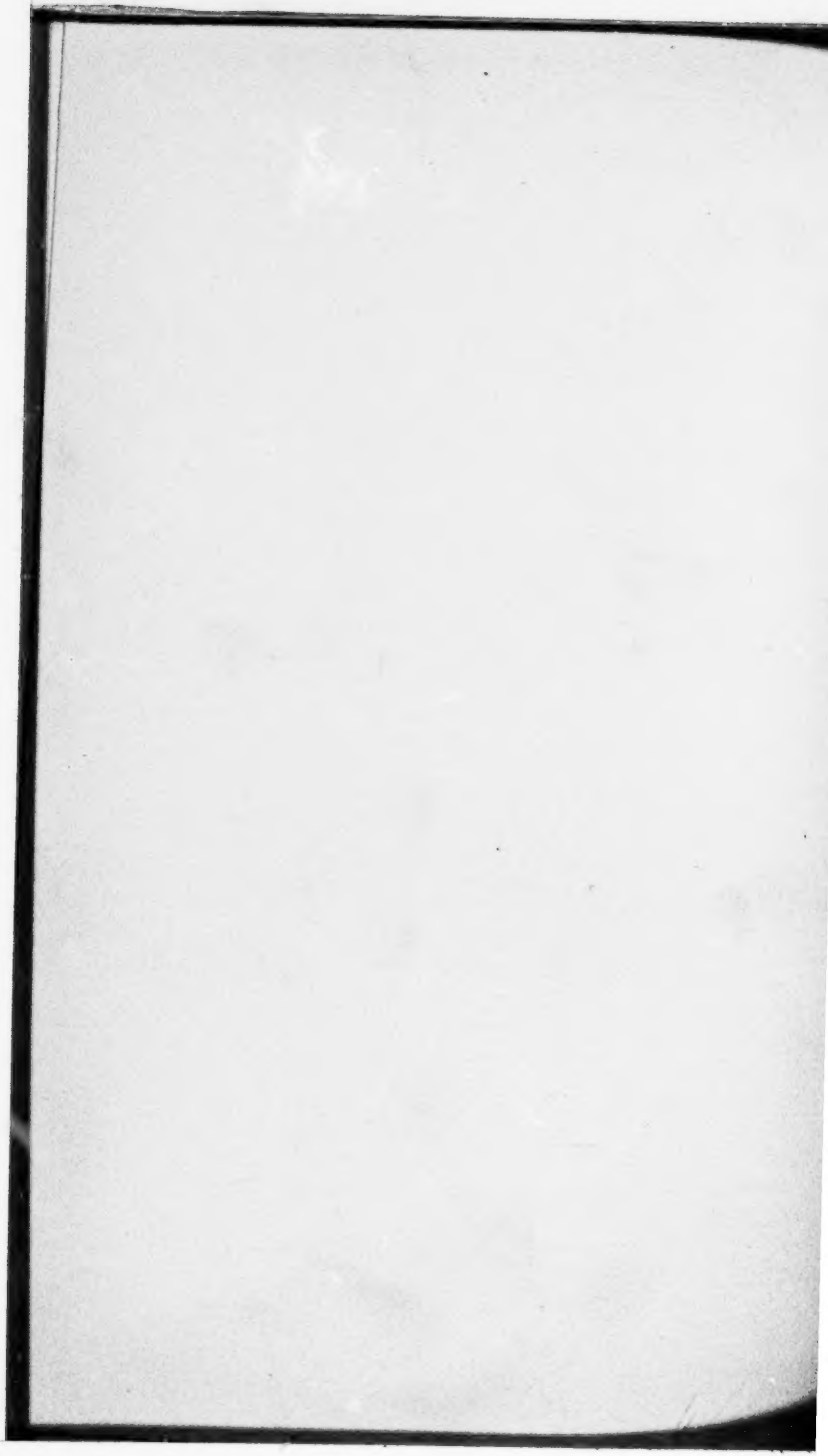

DONATING ACT.

ACT C.

AN ACT to donate to the St. Francis Levee District all the lands of this State within the limits of said Levee District, and for other purposes.

PREAMBLE

Recites certain things.

SECTION

1. Levee Directors may divide State lands in said territory into three grades, and sell same at stipulated prices for benefit of district.
2. Lands exempt from taxation for five years.
3. Levee District may confirm tax sales, provided a bond be executed to the Governor. Must report to Governor.
4. Act in force from passage.

Be it enacted by the General Assembly of the State of Arkansas:

That, for the purpose of assisting the citizens of the State to build and maintain a levee along the St. Francis front in this State, and in consideration of the general good of the State; that all the lands of this State lying within said Levee District, except the 16th section school lands, and all the right or interest the State has or may have within the next five years, by reason of forfeiture for taxes, or to any lands within said Levee District, except said 16th section school lands, is hereby conveyed to said Levee District, under the following restrictions and limitations:

SECTION 1. Said Levee District, represented by its Board of Directors, shall make a descriptive map of said lands, showing the location and character of same. That lands shall be graded into first, second and third grades, with reference to their relative elevation and timber, and a description of the land and timber given. The said Levee District may sell said lands for the minimum prices of $2.50, $1.50 and 50 cents per acre, as to grade, or may issue the bonds of said Levee District, secured by a mortgage on said lands or any part thereof, and payable as the Board of Directors may determine, and the Treasurer of the Levee

Board of said district, upon the receipt of payment of any part or parcel of said lands, shall certify the same to the President of said Board, who shall execute a deed in the name of said corporation to the purchaser of said lands, the money arising from such sales or issuance of bonds to be applied solely to the construction and maintainance (maintenance) of the levee of said Levee District.

SEC. 2. That said lands shall be exempt from State and county taxes for five years, if not sooner sold by said district, and at the expiration of the term of five years from the passage of this act all of the said lands not previously sold by said district shall be assessed in the name of said district for said State and county taxes.

SEC. 3. That the Levee District shall have the same power to confirm the tax sales to lands in said district in a court of equity that is now conferred upon individuals who purchase lands at tax sales, and the proceeding shall be the same as is provided by law for individuals, providing that the President of said Levee Board shall make a bond to the Governor, payable to the State of Arkansas, in the sum of $50,000, conditioned upon the faithful and honest appropriation of the proceeds of the aforesaid lands to the building and maintaining the levee of said district. That the President of said Levee Board shall, on the second Tuesday in May of each year, make a report to the Governor of this State, showing the lands confirmed to said Levee District by courts of chancery, as provided for in this act, and all other lands hereby conveyed, showing the disposition, if any, made of these lands during the preceding year, the funds realized, and where and how expended.

SEC. 4. That this act be in force and take effect from and after its passage.

"This bill having remained with the Governor five days (Sunday excepted), and the General Assembly being in session, it has become a law, this 29th day of March, 1893."

H. B. ARMISTEAD,
Secretary of State.

By E. B. JETT, Deputy.